

period (*see* Millennium Initial Br. at 12); provided the NYSDOS with an extensive and comprehensive consistency study of all relevant coastal zone issues (Millennium Exhibit 14); corresponded with and met with the NYSDOS staff frequently; and otherwise did everything possible to comply in good faith with all relevant requirements. Millennium has shown only the highest regard for the CZMA review process, and Croton's allegation to the contrary is both untrue and unprofessional.

## II.

### **THE SECRETARY SHOULD OVERRIDE THE NYSDOS'S OBJECTION ON CZMA GROUND 1: THE MILLENNIUM PROJECT IS CONSISTENT WITH THE OBJECTIVES OF THE CZMA**

The CZMA provides that a state agency's objection to a proposed activity will be overridden if the Secretary finds either "that the activity is consistent with the objectives" of the CZMA (so-called "Ground 1") or, alternatively, that the activity "is otherwise necessary in the interest of national security" (so-called "Ground 2"). 16 U.S.C. § 1456(c)(3)(A). The Millennium Project satisfies the standards of both Ground 1 and Ground 2, and thus the Secretary should override the NYSDOS's objection.

To show that the Millennium Project satisfies Ground 1 because it "is consistent with the objectives of [the Act]," Millennium must demonstrate that (15 C.F.R. § 930.121):

"The activity furthers the national interest as articulated in § 302 or § 303 of the Act, in a significant or substantial manner.

"The national interest furthered by the activity outweighs the activity's adverse coastal effects, when those effects are considered separately or cumulatively.

“There is no reasonable alternative available which would permit the activity to be conducted in a manner consistent with the . . . [state’s coastal] management program.”

As explained below, the Millennium Project satisfies each of the three elements of Ground 1

**A. The Millennium Project Will Further A Number Of The National Objectives Set Forth In CZMA Sections 302 And 303 In A Significant And Substantial Manner, And The National Interests Furthered By The Project Far Outweigh Any Adverse Coastal Zone Effects**

The Millennium Project will promote at least four of the important national objectives that are set forth in CZMA Sections 302 and 303 in a significant and substantial manner. Moreover, the record compels a finding by the Secretary that the Project’s national interests far outweigh the parochial -- and unfounded -- claims asserted by the NYSDOS, which were properly rejected by the FERC. As the FERC Staff has advised the Secretary (Comments at 3 (emphasis added)):

“On balancing the many interests the Commission is required by statute to consider, *including specifically the impacts to New York’s coastal zone at issue here*, the Commission concluded that the Millennium Project is in the public convenience and necessity and authorized the construction and operation of the project subject to its compliance with various conditions designed to, among other things, protect the environment.”

**The Millennium Project Is A Major Energy Facility That Will Significantly And Substantially Further The National Interest**

Section 303(2)(D) of the CZMA accords “priority consideration” to “orderly processes for siting major facilities related to . . . energy . . .” 16 U.S.C. § 1452(2)(D).<sup>10</sup> In issuing the regulations that implement the CZMA, NOAA expressly stated that “[a]n example of

<sup>10</sup> *Accord*, Decision and Findings in the Consistency Appeal of Southern Transportation Company (September 24, 1985), at 19-20 (“[T]he goals of the CZMA include . . . the siting of transportation facilities.”).

an activity that significantly or substantially furthers the national interest is *the siting of energy facilities* .”<sup>11</sup> It follows that, under the CZMA and NOAA’s regulations, the Millennium Project is a major energy facility that will significantly and substantially further the national interest, as the FERC and the DOE have likewise concluded. For this reason alone, the Millennium Project satisfies the first element of Ground 1 because it “furthers the national interest as articulated in § 302 or § 303 of the Act, in a significant or substantial manner.”

Notwithstanding this self-evident conclusion, the NYSDOS opines that “the Millennium Pipeline does not further any of the objectives of the CZMA in a significant or substantial manner.” NYSDOS Br. at 28. Never even mentioning either the CZMA provision or the NOAA pronouncement quoted in the paragraph above, which make it clear that the Millennium Project will significantly and substantially further the national interest, the NYSDOS instead advances a string of flimsy arguments that must be rejected.

The NYSDOS first argues that Millennium has erroneously contended that the CZMA accords “preferential treatment” to major energy facilities. NYSDOS Br. at 30. Nowhere in its initial brief did Millennium take that position, however. Instead, Millennium simply and correctly stated that its proposed construction and operation of a major interstate pipeline to serve the Northeast is “[a]n example of an activity that significantly or substantially furthers the national interest,” quoting NOAA’s interpretation of the CZMA, and thus satisfies the first element of the Ground 1 standard.

Although the NYSDOS properly concedes that Section 303(2)(D) of the CZMA also accords “priority consideration” to “coastal-dependent uses” (NYSDOS Br. at 31), the

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<sup>11</sup> 65 Fed. Reg. 77124, 77150 (December 8, 2000) (emphasis added).

NYSDOS nevertheless contends that the Millennium Project “is not a coastal-dependent use and by its nature, does not require a coastal location.” *Id.* Perhaps the NYSDOS has some basis for believing that natural gas can somehow be transported to New York City without crossing any of New York’s coastal zone, but Millennium is frankly at a loss to understand how that could possibly be achieved. It is Millennium’s position that the Project obviously requires a coastal location, since its FERC-approved route traverses the coastal zone of Lake Erie and the coastal zone of the Hudson River to reach the New York City markets that will be served. When NOAA concluded that the siting of major energy projects significantly or substantially furthers the national interest, it noted that major energy projects are often “coastal dependent industries with economic implications beyond the immediate locality in which they are located.”<sup>12</sup> That is certainly true of the Millennium Project, which must cross the coastal zone and has “economic implications” that extend far beyond its route on a map. The Project will serve not just New York City markets, but the entire U.S. Northeast region through interconnections with other interstate gas pipelines.

The NYSDOS and its supporters also challenge Millennium’s position that the FERC’s orders approving the Millennium Project should be accorded due weight in determining whether the Project would further the national interest “in a significant or substantial manner” and would thus satisfy the first element of the Ground 1 standard. In particular, the NYSDOS contends that Millennium’s appeal asks the Secretary to defer to the FERC’s decisions and to substitute the Natural Gas Act (“NGA”) for the CZMA in reaching his decision (NYSDOS Br. at 34-35). That is not true.

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<sup>12</sup> 65 Fed. Reg. 77124, 77150 (December 8, 2000).

Millennium has not asked the Secretary to defer to the FERC's decisions, but rather to accord due consideration to those decisions in this proceeding. Likewise, Millennium has not claimed that the NGA overrides the CZMA in this case, but has only asserted, as the Secretary has held, that the determination of the national interest under the CZMA necessarily requires an examination of Federal laws in addition to the CZMA, including the NGA, and an examination of "plans, reports and studies issued by the Federal agencies,"<sup>13</sup> including decisions of the FERC. The Secretary's consideration of the FERC's determinations under the NGA is certainly appropriate in this case. As the FERC Staff stated in its comments to the Secretary (FERC Staff Comments at 2):

"[W]e urge the Secretary to consider the statutory scheme that gives the [FERC] sole responsibility to determine whether and under what conditions a proposed interstate pipeline is required by the public convenience and necessity and to give due weight to the findings that the [FERC] has made in determining that this particular project is in the public interest."

The NYSDOS suggests that the FERC's decisions are entitled to little or no weight and that the Secretary should disregard Millennium's opinion that the regulation of the Nation's gas supply has been entrusted to the FERC's "informed judgment." NYSDOS Br. at 34. In fact, however, it was the United States Supreme Court that decided that the Nation's gas supply had been entrusted by Congress to the FERC's "informed judgment."<sup>14</sup> That determination of the Supreme Court is the law of the land, and it strongly suggests that the Secretary should accord the FERC's decisions great weight, whether as a matter of comity or in

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<sup>13</sup> Decision and Findings in the Consistency Appeal of Mobil Exploration & Producing U.S. Inc. (June 20, 1995), at 80.

<sup>14</sup> *Permian Basin Area Rate Cases*, 390 U.S. 747, 767 (1968). See Millennium's Initial Br. at 24 & n. 21.

recognition of the FERC's expertise in routing and evaluating proposed pipeline projects.<sup>15</sup> As the United States Court of Appeals for the Second Circuit held in concluding that the Natural Gas Act preempted another New York state agency's decision regarding a proposed interstate gas pipeline, "Congress placed authority regarding the location of interstate pipelines in the FERC, a federal body that can make choices in the interests of energy consumers nationally."<sup>16</sup>

In this case, the FERC, after four years of exhaustive study and a careful balancing of all public interest factors, including coastal zone effects, exercised its exclusive jurisdiction and expert judgment by approving the construction of the Millennium Project along the most efficacious route. In reaching its decision, the FERC considered, *inter alia*, the national interests (1) in providing an adequate pipeline network to meet the increasing demand for natural gas in the Northeast, (2) in promoting competitive markets, and (3) in enhancing gas supply diversity for the region. The Secretary should likewise consider those vital national interests, summarized below, that would be served from the siting of a portion of the Millennium Project in New York's coastal zone. As the FERC Staff has noted (FERC Staff Comments at 1):

"In the Natural Gas Act, Congress delegated licensing authority for interstate gas pipelines solely to the [FERC]. It did so to ensure that the national interest in developing a national energy infrastructure would be paramount over local concerns that might otherwise thwart the construction and operation of such project."

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<sup>15</sup> Related contentions that the FERC's decisions should be accorded no weight because they are unlawful and have been appealed (Westchester County Br. at 2; Villages Br. at 16-17) are similarly without merit. Challenges to the validity of the FERC's decisions by opponents of the Project are obviously outside of the scope of the issues to be decided by the Secretary in this proceeding, and the only appropriate presumption should be that both the FERC's decisions and the NYSDOS's objection are valid as a matter of law.

<sup>16</sup> *National Fuel Gas Supply Corp. v. Public Service Commission of New York*, 894 F.2d 571, 579 (2d Cir. 1990).

a. **The Millennium Project Is Required To Satisfy  
An Increasing Demand For Natural Gas**

The FERC's December 19, 2001 order approving the Millennium Project cited a variety of studies and other compelling evidence in support of its findings that there is an increasing demand for natural gas in the region to be served by the Millennium Project and that the Project "can meet the needs of the expanding market on a timely basis." Millennium Exhibit 1 at 62,321-22; *see* Millennium Initial Br. at 25-27. In its subsequent September 18, 2002 order denying rehearing, the FERC confirmed and corroborated those conclusions (Millennium Exhibit 1A at 62,143):

"[C]urrent forecasts continue to project the need for additional infrastructure to meet growing energy demands in this area. For example, the Energy Information Administration's (EIA) Annual Energy Outlook 2002 projects that commercial, industrial, and residential gas consumption in the northeast will increase by 11 percent between 2001 and 2006, and 26.4 percent between 2001 and 2020. The EIA projects that demand for natural gas for electric generation in the northeast will increase by 36.6 percent and 121 percent, respectively, over those two time periods."

As further evidence of the need for the Millennium Project to meet increasing natural gas requirements in the Northeast, the FERC added that (*id.* at 62,144):

"It is also clear that the existing interstate natural gas pipeline capacity in the northeast region, particularly in the vicinity of New York City, has been used at high load factors during peak use months. The increasing demand for natural gas to feed industrial growth, as well as new and planned gas-fired electric power generators, continues to place a large burden on the local natural gas infrastructure. Thus, we believe that there is ample evidence that the New York City area will need additional pipeline capacity in both the short and long term and that the market for natural gas fired electric generation will continue to grow and will support the infrastructure Millennium will add."

FERC Chairman Wood's comments to the Secretary reemphasize that the Millennium Project is needed to meet an increasing demand for natural gas in the Northeast. Chairman Wood notes "the serious need for new infrastructure to deliver energy in the Northeast" as well as the FERC's conclusion "that the project is required to meet the growing demand for natural gas in the region." Chairman Wood's Comments at 1.<sup>17</sup> The FERC Staff adds (FERC Staff Comments at 2):

"As to the issue of need for Millennium, the Commission concluded that the benefits of Millennium's proposed project are clear and significant. The Commission noted that Millennium has entered into firm, long-term, binding precedent agreements with customers for two-thirds of the pipeline's 700,000 dekatherms per day of capacity. It also noted that studies conducted by government, industry, and private organizations, including the Energy Information Administration, Gas Research Institute, Interstate Natural Gas Association of America, and the Cambridge Energy Research Associates, forecast increasing demand for natural gas in the Northeastern United States (particularly for electric generation) and the need for increased pipeline capacity to meet that demand."

Of equal or greater importance, Secretary of Energy Spencer Abraham has personally advised the Secretary that he firmly supports the FERC's conclusions. Secretary Abraham emphatically states that the DOE "**believes that FERC has correctly determined there is a serious need for new natural gas infrastructure in the northeast United States, that the Millennium Pipeline Project can help meet that need, and that there is no reasonable alternative to the project.**" Secretary Abraham's Comments at 1 (emphasis added). In the same vein, the DOE states that "[t]he Millennium Pipeline Project would significantly

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<sup>17</sup> Chairman Wood recently testified that "in New York City and Long Island, . . . transmission constraints limit electricity imports to such a degree that it can become a daily challenge for the local utility to keep the lights on when temperatures peak and rise demand . . ." Testimony Before the Senate Energy and Natural Resources Committee (July 24, 2000), at 2.



contribute needed energy infrastructure and supplies to New York and the crucial northeast corridor.” DOE Comments at 3

Notwithstanding this overwhelming evidence and the expert opinions of the preeminent Federal energy agencies, the NYSDOS cavalierly maintains that the 2002 New York State Energy Plan proves that existing gas pipelines will be more than adequate to meet New York’s needs and that the Millennium Project will therefore not be needed. NYSDOS Br. at 72-82. But New York’s current energy problems do not seem to justify the NYSDOS’s optimism. Thus, the DOE urges the Secretary to adopt the FERC’s findings that:

“The increasing demand for natural gas to feed industrial growth, as well as new and planned gas-fired electric power generators, continues to place a large burden on the local natural gas infrastructure. Thus, we believe that there is ample evidence that the New York City area will need additional pipeline capacity in both the short and long term and that the market for natural gas fired electric generation will continue to grow and will support the additional infrastructure Millennium will add.”<sup>18</sup>

Similarly, FERC Chairman Wood has testified that:

“[I]t is hard . . . to route new gas pipelines (as with Millennium into the New York City area) . . . into . . . dense urban areas . . . . As long as these obstacles persist, the cost of doing nothing will mount -- FERC estimates that current levels of transmission constraints into southeast Connecticut, southeast Pennsylvania, and eastern New York are costing electric customers as much as \$1 billion extra per year in energy cost.”<sup>19</sup>

More significantly, the FERC’s conclusion that the Project is needed to meet an increasing demand for natural gas is not confined to New York State, and instead reflects a

<sup>18</sup> DOE Comments at 3. The New York Public Service Commission has likewise advised the FERC that “[a]dditional pipeline capacity, as proposed by Millennium, is needed in New York.” Comments filed September 21, 2000, at 3.

<sup>19</sup> Testimony Before the Senate Energy and Natural Resources Committee (July 24, 2002), at 6-7.

judgment that the Project is needed on a much wider, regional basis. Secretary of Energy Abraham stresses that “there is a serious need for new natural gas infrastructure in the northeast United States . . . that the Millennium Pipeline Project can help meet . . .” Secretary Abraham’s Comments at 1. Likewise, the FERC Staff has commented that (FERC Staff Comments at 4):

“It can be expected that the Millennium Project will deliver supplies of natural gas into the heavily populated mid-Atlantic region of the United States for a very long time, perhaps the next fifty to one hundred years. This contribution to the national interest is incalculable in terms of economic benefit achieved and environmental consequences avoided over that time-frame.”

Millennium respectfully requests the Secretary to concur in the conclusions of the FERC and the DOE that the Millennium Project “would further the national interest in a significant or substantial manner” by helping to “ensure that the energy needs of the heavily populated Northeastern United States are met.” FERC Staff Comments at 4. Given these emphatic and authoritative Federal energy agency determinations of the need for and benefits of the Millennium Project, the contrary opinions of the NYSDOS and its supporters are entitled to little or no weight.

**b.     The Millennium Project Will Promote  
          The Benefits of Competition**

The Millennium Project would also further national interests in realizing the benefits of competition. As the FERC stated (Millennium Exhibit 1 at 62,321 (emphasis added)):

“The addition of a new pipeline in the region, with access to multiple supply areas, will expand shippers’ options, promoting the growth of competitive markets for natural gas and potentially contributing to lower and more stable natural gas prices over the long term.”

The “lower and more stable natural gas prices” that the Millennium Project would promote in the FERC’s view would be especially important for New York City, as events in just the past few months have shown. Winter temperatures in the Northeast, inadequate pipeline capacity to deliver natural gas into New York City, and low natural gas storage levels have combined to produce skyrocketing prices for New Yorkers. Serious concerns about the soaring natural gas prices in New York were recently expressed by Senator Charles Schumer (D-N.Y.), who has requested a FERC investigation regarding the burdensome price levels in New York markets. Senator Schumer has also released a report showing that natural gas prices in New York increased by 49% in the first week of March 2003 alone and that the sky-high winter prices would cost thousands of New York households hundreds of millions of dollars.

As the FERC has suggested, the Millennium Project can help to remedy the gas-price spike that New Yorkers have experienced. Based on actual energy prices in January 2003 and February 2003 alone, and comparing wholesale price data at relevant gas market hubs, the Millennium Project would deliver natural gas from Canadian supply sources for significantly less than the staggering prices New Yorkers have been paying this winter. On January 28, 2003, for example, New Yorkers were forced to pay more than \$13 per Mcf for natural gas. As indicated in the table below, Millennium would have delivered Canadian gas supplies from Dawn, Ontario to New York City at a cost of only about \$6.50 per Mcf -- including Millennium’s transportation cost -- resulting in an indicated savings of about \$6.60 per Mcf, or more than 50%.

A COLD DAY IN JANUARY		
Energy Cost Comparison On January 28, 2003	Natural gas delivered via existing options	Natural Gas if delivered via Millennium
Cost of 1,000 cubic feet (Mcf) of natural gas	\$5.91 per Mcf at Henry Hub	\$5.84 per Mcf in Ontario, Canada
Cost of pipeline transportation to New York City	\$7.22 per Mcf (effective cost of transportation)	\$0.70 per Mcf
<b>Cost of gas in New York City:</b>	<b>\$13.13 per Mcf</b>	<b>\$6.54 per Mcf</b>
<b>Savings to New York City on January 28 = \$6.59/Mcf or 50%</b>		

Sources: Gas Daily Midpoint Price Index, January 2003

Significantly, moreover, the January 28th wholesale gas price was far from atypical of the prices experienced throughout January and February of 2003 in New York markets. Indeed, in late February the cost of natural gas in New York rose to a whopping \$28 per Mcf.

Considering the Millennium Project’s ability to relieve existing capacity constraints by transporting an additional 700,000 Mcf of gas per day into New York markets and its ability to promote the development of numerous gas storage fields, the benefits of the added competition that the Project would bring to New York would be significant -- not only in terms of cost savings on natural gas bills, but also by concomitant savings on electric bills that would be made possible by power generators’ access to Millennium’s economic supplies. In just January and February 2003 alone, for example, those savings would have been as much as \$200 million, and perhaps more.

Clearly, the additional pipeline capacity and the additional pipeline competition that the Millennium Project would bring to New York and Northeast markets are huge -- indeed, “incalculable,” as the FERC has found. For this additional reason, the Secretary should conclude that the Project would further significant national interests that outstrip any localized coastal zone impacts.

c. **The Millennium Project Will  
Promote Supply Diversity**

A third national interest advanced by the siting of the Millennium Project across a portion of New York's coastal zone will be the diversification of natural gas supplies to the Northeast, which in and of itself is also sufficient to find that the Project furthers the national interest in a significant and substantial manner. As the FERC explained in its December 19, 2001 order (Millennium Exhibit 1, at 62,321):

“The Project will also diversify the range of gas supplies available to the Northeast. Millennium will provide another pipeline for shippers to transport Canadian gas supplies to the region, and Millennium's interconnects with Columbia, Algonquin, and Tennessee will provide access to gas supplies from domestic supply areas as well.”

In comments submitted to the Secretary, the FERC Staff reemphasizes this additional Project benefit (FERC Staff Comments at 2):

“In reaching the conclusion that the Millennium Project is needed, the Commission found that the project will diversify the range of gas supplies available to the Northeast . . . . The Commission projected that the pipeline capacity created by the Millennium Project should foster development of more North American energy supplies . . . .”

2. **The Millennium Project Will Contribute To The  
National Goal Of Energy Self-Sufficiency**

A second CZMA objective furthered by the Millennium Project is energy self-sufficiency. The Secretary has found that CZMA Section 302(j) “recognizes a national objective in achieving a greater degree of energy self-sufficiency”<sup>20</sup> and has recognized that the greater use

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<sup>20</sup> Decision and Findings in the Consistency Appeal of Mobil Exploration & Producing U.S. Inc. (June 20, 1995), at 29, 81; *see* Decision and Findings in the Consistency Appeal of Gulf Oil Corp. (December 23, 1985), at 38.

of natural gas can “help lessen the Nation’s reliance on foreign oil” and reduce the “undesirable consequences of oil import dependency . . .”<sup>21</sup>

The Millennium Project will promote the greater use of natural gas in the Northeast -- the U.S. region most dependent on foreign oil -- and thus will significantly contribute to the CZMA objective of energy self-sufficiency. As the FERC explained in its December 19, 2001 order approving the Project (Millennium Exhibit 1 at 62,321):

“The Commission projected that the pipeline capacity created by the Millennium Project should foster development of more North American energy supplies, and that the project will allow for a greater measure of energy independence, especially to the extent new gas supplies delivered to the region by the Millennium Project displace overseas energy supplies.”

In their comments to the Secretary, both the FERC and the DOE reiterate that the Millennium Project will promote the CZMA objective of energy self-sufficiency. “The Department of Energy believes the Millennium Project ‘is consistent with the objectives and purposes of the Act’ because it furthers the national interest of ‘attaining a greater degree of energy self-sufficiency’ (16 U.S.C. § U.S.C. § 1451(j))” (DOE Comments at 1). Likewise, the FERC notes that the Project “will allow for a greater measure of energy independence, especially to the extent new gas supplies delivered to the region by the Millennium Project displace overseas energy supplies.” FERC Staff Comments at 2-3.

In a remarkable disagreement with these conclusions of the principal Federal energy agencies, the NYSDOS maintains that the Millennium Project would further no national interests, including the objective of energy self-sufficiency. Astonishingly, the NYSDOS argues

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<sup>21</sup> Decision and Findings in the Consistency Appeal of Mobil Exploration & Producing U.S. Inc. (June 20, 1995), at 81-82.

that “it is impossible for the Millennium Pipeline to further the national interest of the United States in energy self-sufficiency” because the Project will transport gas from Canada (NYSDOS Br. at 36). That claim is both wrong and misguided. The Millennium Project will transport both U.S. and Canadian gas supplies.<sup>22</sup> Moreover, U.S. policies, including the North American Free Trade Agreement, (“NAFTA”), promote the energy self-sufficiency of North America, not just the USA. As a result of NAFTA, “Canada gains assured nondiscriminatory access for its energy exports to the United States, and the U.S. gains assured access to Canadian energy supplies to meet its imported energy requirements.”<sup>23</sup> Therefore, as the FERC has advised the Secretary, “The natural gas will primarily come from Canada, a close political and economic ally of the United States, and will reduce reliance on overseas supplies.” FERC Staff Comments at 4.

The NYSDOS also speculates that the Canadian government may “in its own national interest” decide to terminate gas exports through Millennium’s pipeline. NYSDOS Br. at 37. The DOE has found, however, that the U.S. can rely on the security of gas supplies from Canada:

“Natural gas has been imported from Canada for many years and there have been no instances of a major natural gas supply interruption that would call into question Canada’s future reliability as a supplier of natural gas to this country.”<sup>24</sup>

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<sup>22</sup> Some of the gas received by Millennium at the Canadian border will originate from domestic supplies that have been transported from domestic producing regions to the Chicago market area and then on to the Canadian market hub (Dawn) from which most of Millennium’s gas supply will emanate, while other domestic gas supplies will be received by Millennium at interconnections in the U.S. with a number of other interstate gas pipeline systems in New York State.

<sup>23</sup> United States-Canada Free Trade Agreement Implementation Act of 1988, House Energy and Commerce Committee Report, H.R. Rep. No. 100-816, Part 7, 100th Cong., 2d Sess., at p. 7 (1988).

<sup>24</sup> *Brooklyn Union Gas Co.*, DOE/OFE Opinion and Order No. 368, 1 FE ¶ 70,285 at 71,215 (1990).

### **3. The Millennium Project Will Promote Compatible Economic Development In The Coastal Zone**

A third CZMA objective that will be furthered by the Millennium Project is economic development in the coastal zone. CZMA Section 303(2) recognizes the “needs for compatible economic development” in the coastal zone (16 U.S.C. § 1452(2)), and the Secretary has found that such economic development is one of the CZMA’s objectives.<sup>25</sup>

In this case, Millennium will be supplying huge volumes of natural gas, the fuel of choice for electric generation plants located along the Hudson River, in the coastal zone in the New York City area, and elsewhere in New York State. The Project will thus facilitate “compatible economic development” in the coastal zone by providing the energy infrastructure necessary to meet increasing demands for natural gas in the region while at the same time advancing clean air objectives and improving air and water quality in the coastal zone. As the FERC decided in its December 19, 2001 order (Millennium Exhibit 1, at 62,308), the Millennium Project is necessary “to insure the timely development of an adequate energy infrastructure, particularly in large employment and population centers such as New York City.” In this additional, significant respect, the Project will further and support important national interests recognized in the CZMA.<sup>26</sup>

The NYSDOS’s attempt to disparage the Project’s ability to promote economic development in the coastal zone is futile. The NYSDOS speculates that since ten other pipeline projects, some never actually proposed, might be able, in combination, to fulfill New York’s gas needs, the Millennium Project by itself is thus “not necessary to promote compatible economic

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<sup>25</sup> See, e.g., Decision and Findings in the Consistency Appeal of Davis Hemford (May 21, 1992), at 15.



development” in the coastal zone. NYSDOS Br. at 38. Applying this “logic” to every other project would of course produce the absurd conclusion that no pipeline project would promote economic development. Moreover, the conclusions of the FERC and the DOE that the Project is needed directly refute the NYSDOS’s unfounded position and confirm that the Project will in fact promote economic development.

Similarly without merit are the Villages’ assertions that “Millennium seeks only to pass through the coastal zone to transport gas to areas outside of the coastal zone” (Villages Br. at 27) and that “[t]he pipeline will deliver no natural gas to the Haverstraw Bay or Croton River zones at all . . . .” *Id.* at 28. Millennium proposes to serve substantial markets in New York City, which is in the coastal zone, as well as the Bowline Generating Station on the western shore of the Hudson River, which is also in New York’s coastal zone.

#### **4. The Millennium Project Will Serve To Protect And Enhance Coastal Zone Resources**

The Millennium Project will also further a fourth CZMA objective -- “the national policy . . . to preserve, protect, develop, and where possible, to restore or enhance, the resources of the Nation’s coastal zone.” CZMA Section 303(i), 16 U.S.C. § 1452(i). As Millennium has explained, the Project will substantially reduce air emissions (including the SO<sub>x</sub> and NO<sub>x</sub> emissions targeted by the Administration’s Clean Skies initiative), improve water quality, protect fishery resources, and reduce barge traffic, all of which will preserve, protect, and enhance the resources of the coastal zone. *See* Millennium Initial Br. at 32-37.

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<sup>26</sup> *See* Decision and Findings in the Consistency Appeal of Virginia Electric and Power Co. (May 19, 1994), at 14.

The Secretary should give proper weight to these significant environmental benefits to the coastal zone in reaching a decision in this case. As the FERC Staff observes in its comments to the Secretary (FERC Staff Comments at 4):

“[W]hile no fossil fuel (or any other fuel for that matter) is completely benign in terms of its environmental effects, natural gas makes far less of a contribution to global warming than, for example, other fossil fuels, such as coal or fuel oil, that are likely to be used in its place.”

The NYSDOS does not deny that the Millennium Project will generate environmental benefits for the coastal zone, but again offers its circular argument that since “[a]ny natural gas, not just Millennium’s, . . . may improve air quality, the Millennium Project is not critical to the achievement of that objective.” NYSDOS Br. at 39. Once again, the use of this “logic” would produce the absurd conclusion that no pipeline project would improve the coastal zone’s air quality, since other projects could always achieve the same result.

Other Project detractors assert that it “defies common sense” to suggest that the Millennium Project would benefit the coastal zone (Villages Br. at 28), but that reflects the worst sort of parochialism that Congress probably had in mind when it authorized the Secretary to override state agency objections. In its comments to the Secretary, the American Gas Association properly criticizes this “not in my backyard” (“NIMBY”) attitude toward infrastructure development, perhaps best exemplified by the “Not Under My Backyard” (“NUMB”) group in Westchester County, New York that has long opposed the Millennium Project, noting that:

“[E]nvironmental advocates suggest that the U.S. needs more natural gas, not less, to help environmental quality. In its 2002 study, *Designing a Climate Friendly Energy Policy: Options for the Near Term*, the Pew Center on Climate Change urges increased

natural gas production and natural gas infrastructure expansion, much like the Millennium pipeline project, for environmental improvement.”<sup>27</sup>

**5. The Millennium Project's Individual And Cumulative Effects On The Coastal Zone Will Be Temporary And Minimal**

The record demonstrates that the Project's potential individual and cumulative adverse coastal effects will be, at worst, both temporary and minimal, and that the functional viability of no ecosystem will be adversely affected. Millennium Initial Br. at 37-94.

**a. The Project's Effects On Haverstraw Bay Will Be Temporary And Minimal**

Millennium explained in its initial brief that its exhaustive analysis of potential Hudson River crossings along a 17-mile stretch from Tomkins Cove to Dobbs Ferry led it inexorably to the conclusion that the only feasible crossing location was the proposed route across Haverstraw Bay. Millennium Initial Br. at 37-38. Millennium also explained that the FERC studied the proposed route, conducted an extensive search for alternatives, and concluded that the proposed Haverstraw Bay crossing was the best, and only available, crossing location. *Id.* at 41-42, 45-48. Finally, Millennium explained that the proposed Hudson River crossing was not only approved by the FERC (Millennium Exhibits 1 and 1A), but was also the subject of a favorable Section 401 Water Quality Certificate issued by the New York State Department of Environmental Conservation (“NYSDEC”) (Millennium Exhibit 9) and a “no-jeopardy” Biological Opinion issued by the National Marine Fisheries Service (“NMFS”) (Millennium Exhibit 8). *Id.* at 45-49.

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<sup>27</sup> Comments of the American Gas Association dated January 6, 2003, at 1.

More importantly, Millennium has explained that the coastal zone impacts of the Hudson River crossing will be temporary and minimal. The evidence shows, in particular, that (Millennium Initial Br. at 42-47):

- The Project's footprint will directly affect less than 0.2% of Haverstraw Bay's designated habitat and just 0.08% of the functional habitat (including areas contiguous to the Bay and functionally connected with it).
- Because of the low-impact construction method to be employed, the installation of the pipeline will affect, either directly or indirectly, only 1.5% of Haverstraw Bay's designated habitat (*i.e.*, just 108.5 acres of the total 7,040 acres in the Bay), and just 0.4% of the Bay's functional habitat.
- No area in the Bay will be open for excavation for more than 14 days, and no more than 1,300 feet of excavation area will remain open at any one time.
- Construction will be completed within 2.5 months and will be scheduled to minimize impacts on sensitive biota. The bottom contours of the river will be reestablished to within one foot of the original contours when construction has been completed.
- Within one year after the pipeline has been installed, all benthic communities will be reestablished.

The NYSDOS does not disagree with this summation of the Project's likely impacts on Haverstraw Bay. Nevertheless, espousing a "zero-tolerance," "no dredging" policy, the NYSDOS states that any new dredging outside the shipping channels in the Bay is unacceptable and that the potential turbidity impacts on the 108 acres of the Bay that might be

affected are also unacceptable. NYSDOS Br. at 46-70; Cortlandt Br. at 27; Villages Br. at 30-34. In support of this dogmatic conclusion, the NYSDOS offers its own designation of the Bay as a Significant Coastal Fish & Wildlife Habitat, selective quotations from its own “habitat documentation” characterizing the Bay, and its own generalized “concerns” regarding the proposed pipeline.

What the NYSDOS fails to provide, however, and cannot produce, is any tangible evidence that the likely impacts on Haverstraw Bay will be of any ecological import or that will outweigh the national interests that would be served by the Millennium Project. Indeed, the NYSDOS agrees, as it must, that the studies of Hudson River impacts conducted by the FERC, LMS Engineers, and NMFS determined that the proposed crossing would affect no more than 1.5% of Haverstraw Bay’s designated habitat, would be completed in 2.5 months, would result in the mortality of no more than one of the 55,000 shortnose sturgeon in the river, and would permit affected benthic communities to be reestablished within a year following the installation of the pipeline.

In short, the record convincingly demonstrates that Millennium will employ the best available construction technology for the Haverstraw Bay crossing and that the resulting environmental effects on Haverstraw Bay -- whether physical, biological, or chemical -- will be temporary and minimal.

**(1) The Staged, Open-Water Lay-Barge Construction Method Will Limit Adverse Effects On Aquatic Resources To The Maximum Extent Practicable**

Contrary to the NYSDOS’s claims, the record most certainly does support the conclusion that the lay-barge construction method is the most environmentally benign technique

available for crossing the Hudson River. *Contrast* Millennium Initial Br. at 39-42 *with* NYSDOS Br. at 55. Moreover, the record also fully supports Millennium's contention that the responsible regulatory agencies (as well as leading experts in the field) agree with this assessment.<sup>28</sup>

Millennium developed its proposed lay-barge construction method to address the concerns of the responsible regulatory agencies. Initially, Millennium proposed a conventional dredging method involving the use of a conventional bucket and the side casting of spoil. Millennium Initial Br. at 39. However, Federal and state agencies expressed concerns that the conventional dredging method would require a single excavated trench across the whole river, which would result in undue turbidity, blockages of fish passageways up and down the river, and a prolonged construction period. To allay all of these concerns, Millennium developed an innovative lay-barge construction method in which the trench will be excavated in short segments, the excavated river sediment will be stockpiled in storage barges (rather than on the river bottom), the pipe will be installed in the trench from a barge (*i.e.*, the lay-barge), and then the trench will be backfilled from the storage barges. As a result, only 1,300 feet of trench will be open at any time, permitting fish movement up and down the river, and the trench will not be open for more than a two-week period at any given location, minimizing the extent and duration of ecosystem impacts at any particular location. Millennium also agreed to complete the

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<sup>28</sup> *Contrast* NYSDOS Br. at 55 (disputing Millennium's claim that regulatory agencies agree that lay barge construction will have the least environmental impact) *with* Millennium Initial Br. at 39-42; Millennium Exhibit 5 [FERC Biological Assessment, dated January 2001 ("BA")]; Millennium Exhibit 6 [FERC Supplement to the Biological Assessment and Essential Fish Habitat Assessment, dated July 2002 ("Supplemental BA/EFHA")]; Millennium Exhibit 7 [FERC Essential Fish Habitat Assessment, dated January 2001 ("EFHA")]; Millennium Exhibit 8 [NMFS Opinion, dated September 14, 2001, finding listed species and their survival not jeopardized by the Project]; and Millennium Exhibit 8A (NMFS Revised Opinion, dated September 6, 2002 ["Revised Opinion"]) (recommending incorporation of additional measures to further mitigate blasting impacts, but, otherwise, reaffirming prior conclusions and opinions).

construction of the entire Haverstraw Bay crossing in the 2.5-month period between September 1 and November 15, the time window that the resource agencies agreed will minimize effects on sensitive aquatic resources. Moreover, to further minimize construction effects, closed-bucket dredges (instead of the originally proposed open-bucket dredges) will be used to reduce impacts from increased turbidity and sediment resuspension. Millennium Initial Br. at 39-40.

The FERC properly concluded that Millennium's proposed construction method for crossing the Hudson River represented the best available technology. The FERC's FEIS, EFHA, and BA all find that there is no alternative construction technique that could minimize ecosystem impacts to any greater degree. Millennium Initial Br. at 41-42. Thus, the FERC found that the proposed construction methodology “**represents a significant reduction in impact when compared to [ ] conventional dredging**” (Millennium Exhibit 7 at 8 (emphasis added)) and (2) is the “**best available' method with the least overall impact on [Essential Fish Habitat] in Haverstraw Bay.**” *Id.* at 21 (emphasis added). Additionally, the FERC found that Millennium's modeling of impacts was “reasonable” and “appropriately conservative for a sensitive habitat such as Haverstraw Bay.” *Id.* at 12; Millennium Exhibit 5 at 3-5.

Finally, the propriety of the proposed lay-barge construction method is not at all impugned by the incredible claims regarding horizontal direction drilling (“HDD”) and environmental beneficial boring (“EBB”) that are set forth in the unsigned, unstamped, so-called “expert” report of O’Brien & Gere Engineers (“OBG”) that has been presented by the Villages (Villages Exhibit 2). As the FERC has discussed in its FEIS, Millennium considered but rejected HDD as infeasible due to technical constraints, construction constraints, and the lack of an overall environmental benefit. Millennium Exhibit 2 (FEIS), Vol. I, at 5-57. Corroborating this conclusion is the report of Baker Engineering NY, Inc. (the “Baker Report”) regarding alternative

routes and construction methods proposed by the NYSDOS and other Project opponents. Millennium Exhibit 78. The Baker Report confirms that HDD and EBB are not feasible, available, or proven methods because they have never been attempted, much less achieved, for anything even approaching the 2.1 mile span at issue in Haverstraw Bay. Millennium Exhibit 78 at 20 (noting that the 2.1 mile Haverstraw Bay crossing is an order of magnitude longer than anything accomplished by anyone with any boring technique). Even Cherrington Corporation, an HDD proponent with which O'Brien & Gere consulted, admits that the magnitude of the Haverstraw Bay crossing places the proposed crossing "completely outside the realm of conventional HDD technology" and that the EBB technology "has had limited opportunities for use, therefore placing it in the realm of research and development also." Villages Exhibit 2 at Appendix E. Because these technologies are admittedly "in the realm of research and development" and thus unproven, they are not "available" alternative construction methods for the Hudson River crossing.

**(2)     The Project's Impacts On Haverstraw Bay Will Be Temporary And Minimal**

Millennium's low-impact construction method, in combination with the natural restorative processes of Haverstraw Bay, will result in only short-term and limited effects on the coastal zone. Millennium Initial Br. at 42-54. Nevertheless, without any factual basis, the NYSDOS and other Project opponents have attempted to paint a picture of widespread destruction and devastation resulting from the river crossing. Fatally, however, they fail to evaluate the Project-affected area with any type of realistic perspective in terms of the overall Haverstraw Bay functional habitat. They also fail to take account of the short-term nature of the construction, the specific construction window, the restoration measures that will be



implemented to restore benthic contours and composition, and the other extensive avoidance and mitigative measures to which Millennium has committed.

Instead, the Project's opponents continue to press unsupportable claims of long-term, permanent impact, relying on selective excerpts or superseded agency correspondence, and ignoring well-documented studies, official agency opinions, and site-specific plans and analyses. *See, e.g.*, NYSDOS Brief at 57-68, 70 (alleging, *inter alia*, reduced carrying capacity and impacts from turbidity/sediment resuspension, sediment redeposition, chemical contamination, and blasting); Villages Exhibit 2 at 6-7 (summarily rejecting the FERC's "minimal impact" conclusion in the EFHA and stating, without support or citation to any authority, that "it is certain that the project would have an adverse effect on the EFH and the aquatic species and physical characteristics of portions of Haverstraw Bay"). These claims of the NYSDOS and its supporters are unfounded.

### **The Pipeline Footprint**

The Project's footprint in Haverstraw Bay -- the directly affected area -- will comprise only 0.2% of the designated habitat and only 0.08% of the functional habitat (which includes areas contiguous to, and functionally connected with, Haverstraw Bay). Because this functional habitat possesses high productivity but low diversity and is relatively uniform spatially, temporal impacts to this minute part of the Bay will be ecologically insignificant. Millennium Exhibit 14 at 3

The NYSDOS seizes on the fact that the proposed Hudson River crossing would have short-term impacts on 108.5 acres of designated habitat -- an area that includes not only the portions of the Bay that would be directly affected by construction, but also portions that would

be affected by sediment deposition. *See* NYSDOS Br. at 58. However, the designated habitat consists of more than 7,000 acres, and thus areas, the Project will affect only 1.5% of that habitat. By any measure, the pipeline's footprint will affect an extremely small percentage of a spatially uniform designated habitat. In somewhat analogous contexts (*e.g.*, oil and gas exploration), the Secretary has found the small size of a project's footprint to be pertinent in assessing its environmental impact. *See, e.g., Amoco Prod. Co.*, 1990 NOAA Lexis 49, \* 65; *Texaco, Inc.*, 1989 NOAA Lexis 32, \* 20-21. Moreover, the Secretary has overridden state agency decisions even in the face of long-term, permanent impacts to a significant amount of ecologically sensitive habitat. *See, e.g., Southern Pacific Transportation*, 1985 NOAA Lexis 73, \*22-35 (Sept. 24, 1985) (involving six-months of construction affecting the largest undisturbed salt marsh in Santa Barbara County, California, "sedimentation over about 100 acres of salt marsh and some conversion of wetlands to fastlands," and the potential for "additional damaged habitat value due to increased scour and erosion").

#### **Short-Term Physical Effects**

Millennium's proposed construction in Haverstraw Bay will take place in small areas, none of which will remain open for longer than 14 days, and the substrate will be rapidly returned to its original contours and composition. Millennium Initial Br. at 43-44; *see also* Millennium Exhibit 2, Vol. I, FEIS, at 5-62. Significantly, moreover, the construction will have no effect on tidal flow, which is the primary mechanism for controlling physical habitat and water quality in Haverstraw Bay. *Id.* There will be no change in the shape of the river bottom after construction, and there will be no structures remaining in the water column. *Id.* The shallow estuarine environment, tidal flow, river discharge, and wind/storm events will act to smooth any irregularities in the substrate after backfilling. *Id.* While turbidity will be increased

locally during construction, overall water quality will not be significantly impaired. Increased sedimentation resulting from excavation and backfilling will be confined to the vicinity of the trench, and tidal action will rapidly restore and stabilize the bottom surface. Millennium Exhibit 14 (LMS Study) at 3, 33-35; Millennium Exhibit 2 (FEIS), Vol. I, at 5-70.

In somewhat analogous contexts (*e.g.*, transportation facility renovations involving excavation and dredging and oil and gas exploration), the Secretary has overridden state agency objections where a project was of short duration and had a limited area of impact, notwithstanding the existence of some adverse effects on water quality and biota (from increased turbidity, resuspension of sediments and smothering of benthic organisms). *See, e.g., Southern Pacific Transportation*, 1985 NOAA Lexis 1, \* 7 & \*21 (noting short-term adverse effects on bottom-dwelling organisms from benthic disturbance and long-term habitat loss); *Gulf Oil*, 1985 NOAA Lexis 1, \*12, \*14-15, \*22-28 (Dec. 23, 1985) (noting alteration of subtidal benthic community from pipeline laying and burial and toxic discharges that would affect hardbottom communities); *Texaco, Inc.*, 1989 NOAA Lexis 32, \*20-21, \*26-28, \*32 (noting temporary impacts on phytoplankton production from increased turbidity and impacts to benthic communities from anchor placement, drilling and disposal of drilling muds and cuttings). Thus, the NYSDOS's unsubstantiated claims, which attempt to transform short-term, localized effects (*e.g.*, increased turbidity and sediment resuspension in the vicinity of the trench) into "long-term ecological alterations that reduce [ ] carrying capacity . . . , change [ ] community structure, [and] reduce [ ] productivity" (NYSDOS Br. at 56-58), should be rejected.<sup>29</sup>

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<sup>29</sup> While the NMFS's Revised Opinion (Millennium Exhibit 8A) asserts one potential "permanent disturbance" -- fracturing of bedrock on the eastern shore if blasting is required -- it does not attribute any significant ecosystem import to this effect, unlike the carrying capacity and ecosystem productivity claims made by the NYSDOS. With respect to listed species, the

### **Biological Effects**

The biological impacts of Millennium's Hudson River crossing will also be of no ecosystem significance, because they will be limited to the short-term loss of benthic life and the temporary displacement of mobile aquatic life in the vicinity of the pipeline's footprint.

Millennium Initial Br. at 44-49; Millennium Exhibit 2 (FEIS), at 5-59 to 5-62, 5-69 to 5-71, 7-6 to 7-7. Nekton will generally avoid the work area and will not be affected. Millennium Exhibit 2 at 5-70; Millennium Exhibit 6 (Supplemental BA/EFHA) at § 3.0 (discussing mitigation measures to ensure that fish will avoid or be excluded from the blast area); Millennium Exhibit 8A (NMFS Revised Opinion) (discussing and recommending mitigation measures to minimize blasting impacts).

Further, Millennium's Hudson River crossing will not affect the migratory behavior of fish, since the sequential nature of the construction will leave the vast majority of the river width available for their movement at any given time. Millennium Exhibit 8 (NMFS Biological Opinion), at 14 ("[G]iven construction of the pipeline will occur in 1,300 foot sections across the river, shortnose sturgeon should still be able to use migration corridors on either side of dredging/pipelaying operations."). Additionally, as found by both the NMFS and FERC, construction-related increases in the suspension of sediments in the water column, or the resuspension of potentially contaminated sediments, will have no significant impact on listed species or their habitat. Millennium Exhibit 7 (EFHA) at 11-17 (concluding that there would be only temporary, minimal effects on biota); Millennium Exhibit 8 (NMFS Biological Opinion) at

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Revised Opinion reaffirms NMFS's ultimate no jeopardy conclusion. Regarding EFH, the Revised Opinion notes the potential effects of blasting but does not state that those impacts are unacceptable and recommends additional mitigation that the FERC has required Millennium to implement.

14 & 15 (stating that “adult sturgeon seem to be able to withstand some degree of suspended sediments given they are frequently found in turbid waters and “[a]lthough shortnose sturgeon in the action area may experience a temporary increase in bioaccumulation [from resuspension of contaminated sediments], exposure will not be long term and should not affect sturgeon health . . .”); Millennium Exhibit 8A (NMFS Revised Opinion) (noting resuspension of contaminants as a potential impact of blasting, but reaffirming “no jeopardy” conclusion respecting listed species).

In short, the very small area of disturbance relative to the total habitat area, the short-term nature of the disturbance, and the rapid recovery documented for this habitat from the implementation of far more disruptive dredging activities ensure that the Project will not significantly adversely affect biota. Millennium Initial Br. at 45-46. As summarized in the FEIS (Millennium Exhibit 2, Vol. I, at 5-70):

“[M]ost adverse effects [on fisheries] would be limited to the immediate vicinity of the dredging and the time it takes for the disturbed area to return to preconstruction conditions. . . . Because of the relatively small total area of the bay that would be affected [1.5 percent], the short length of active construction [about 1,300 feet], and the relatively short time to fabricate and install the pipe within the 1,300-foot construction work area [about 5 days], impact on fisheries would be short-term and limited to the alteration of benthic invertebrate communities in the direct path of construction. However, benthic organisms have been found to recover rather rapidly from construction disturbance.”

Other empirical evidence confirms that the viability of the Haverstraw Bay’s significant habitat will not be impaired by the Millennium Project. Millennium Initial Br. at 46. Notwithstanding periodic maintenance dredging of the navigation channel in Haverstraw Bay, thirty years of sampling reveal that fish and benthic communities have flourished, and important fish populations (*e.g.*, shortnose sturgeon and striped bass) have increased substantially. Given

the far more disruptive nature of maintenance dredging in comparison with the low-impact lay-barge method proposed by Millennium, the Project's construction will not significantly impair the habitat. Millennium Exhibit 8 (NMFS Opinion) at 13 (“In addition to relatively rapid recovery of certain species, sturgeon have extensive foraging habitat outside of the action area. Thus, the temporary reduction in foraging habitat should not greatly affect shortnose sturgeon.”).

Haverstraw Bay's resilience (even in response to conventional dredging) is attributable to the natural forces shaping its environment. Millennium Initial Br. at 47. Shallow estuaries like Haverstraw Bay commonly experience extremes caused by tidal flow and natural disturbances such as coastal storms and river floods. Aquatic life capable of surviving in such an environment is adapted to these severe natural fluctuations and thus recovers quickly from like disturbances, even if man-made. Millennium Exhibit 2 (FEIS), Vol. I, at 5-70; Millennium Exhibit 8 (NMFS Opinion) at 13; Millennium Exhibit 8A (NMFS Revised Opinion). Accordingly, the Project will not significantly impair the vitality of any component of the Haverstraw Bay ecosystem.

Importantly, the finding of “no significant adverse impact” is repeatedly echoed by the FERC in its FEIS, BA, EFHA & Supplemental BA/EFHA. As the FERC has explained:

“Pipeline construction would have a temporary effect on a very small portion of the designated habitat and the total available functional habitat of Haverstraw Bay. Construction activities would occupy a very small portion of the water column and estuary bottom, and the effects would be limited to temporary disturbance and restoration of the substrate. There would be no mechanism that could cause a significant long-term change in the physical, biological or chemical parameters of Haverstraw Bay. Because no structure would remain in the water after construction, there would be no long-term impact on the parameters that define the habitat. Food chain relationships and predator/prey relationships would not be altered because there would be no significant change in the

population size of any species in the bay. The effects of pipeline construction on living resources would be a temporary reduction of benthic infauna and some epibenthos in the footprint of the trench and a temporary redistribution of epibenthos and fishes during construction. Th[is] small temporary reduction . . . would not alter feeding relationships, which are ecosystem-wide characteristics. Epibenthic organisms would return to the trench footprint soon after backfilling, providing a food source for fish that may enter the area.”<sup>30</sup>

Thus, the FERC concluded and later reaffirmed that (1) “there would be no substantial adverse impact (individual or cumulative) on E[ssential] F[ish] H[abitat] in Haverstraw Bay” (Millennium Exhibit 7 at 24); (2) there would be “no long-term or cumulative effects” on the shortnose sturgeon, and no adverse effects on the remaining federally listed species (Millennium Exhibit 5 at 3-8 & 4-1); and (3) “the proposed project may adversely affect, but is not likely to jeopardize the continued existence of the shortnose sturgeon” (Millennium Exhibit 6 at §§ 4.1, 4.2, & 4.3).

Likewise, the NMFS reached the same “no significant impact” conclusion, stating in its Biological Opinion that (Millennium Exhibit 8 at 17-18):

“Based on the time of year the project is to be completed, the apparent low density of shortnose sturgeon in the action area, and the type of dredge equipment being employed, NMFS believes that the incidental take of shortnose sturgeon will be minimal. Considering the environmental baseline, the effects of the proposed action, and future cumulative effects in the action area, the proposed project is not likely to reduce the reproduction, numbers, and distribution of Hudson River DPS in a way that appreciably reduces their likelihood of survival and recovery in the wild. . . . After reviewing the current status of the species discussed herein, the environmental baseline for the action area, the effects of the proposed action and the cumulative effects, it is the NMFS’s biological opinion that [pipeline construction conducted from

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<sup>30</sup> Millennium Exhibit 2 (FEIS), Vol. I, at 5-70; *see also* Millennium Exhibit 5 (BA), at 3-8 & 4-1 ; Millennium Exhibit 7 [EFHA], at 13-16 & 24; Millennium Exhibit 6 [(Suppl. BA/EFHA)], at §§ 4.1, 4.2, & 4.3.



September 1 to November 15 in Haverstraw Bay in the Hudson River] may adversely affect, but is not likely to jeopardize the continued existence of [listed species under NMFS's jurisdiction].”

*A fortiori*, the record demonstrates that the Project's anticipated biological effects on Haverstraw Bay are not significant from an ecological perspective.

### **Chemical Effects**

Chemical effects on the substrate will be virtually non-existent, since the original sediments contain very low contaminant levels and will be used to backfill the trench. The only potential chemical effect will be confined to the turbidity plume. No material will be added to, or removed from, the water or sediment during or after construction. Millennium Initial Br. at 44.

The same "no significant impact" conclusion pertains to PCBs. Despite the repeated protests of the Villages and the intimations of the NYSDOS, concerns respecting PCBs (or other unspecified "contamination") have been thoroughly investigated and satisfactorily resolved by the FERC. The sediments have already been tested and have exhibited very low contaminant levels and no PCBs. *See* Millennium Exhibit 14 (LMS Study) at 4 & 37; Millennium Exhibit 2 (FEIS), Vol. I, at 5-70.

Furthermore, PCBs were specifically taken into account by the reviewing agencies.<sup>31</sup> PCB concentrations tend to be relatively low in Haverstraw Bay, however, and no PCBs were detected in the samples collected by Millennium at the proposed crossing location.<sup>32</sup>

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<sup>31</sup> Millennium Exhibit 1, at 62,157 (stating that the FEIS evaluated the impacts to crossing the Hudson River" and the "final EIS did not underestimate these impacts"); *see also* Millennium Exhibit 2 (FEIS), Vol. I, § 4.3.4, at 4-19 (stating that "PCB concentrations in the river vary considerably depending on the river's flow, depositional characteristics of various reaches, and the distance to the source release").

<sup>32</sup> Millennium Exhibit 2 (FEIS), Vol. I, § 5.3.4, at 5-61 (noting NYSDEC's requirement that additional cores be collected at the crossing location; stating that those sediment cores will be



Also unconvincing is the Villages' abject speculation that chemical impacts have been understated because the pipeline crossing in "previously undisturbed shallow sediment" is likely to encounter higher PCB concentrations than in deeper, periodically dredged western portions of the Bay. *See Villages Br.* at 32-33. As already noted, sampling has been performed, revealing no PCBs. In any event, beyond the sampling that has already taken place, Millennium will perform additional sampling (in accord with the NYSDEC's water quality certificate) prior to any construction, and also implement all measures that the NYSDEC deems necessary.

### **Potential Blasting Effects**

The blasting issue has been thoroughly studied, and all concerns have been addressed and resolved. The FERC's Supplemental BA/EFHA concludes that any effects from blasting will be "temporary . . . [and of] very short impact duration [over] only a very limited area" and, therefore, that blasting is "not likely to add substantial cumulative adverse effects" on aquatic resources. Millennium Exhibit 6 at §§ 4.1 & 4.2. After reviewing Millennium's plans and the FERC analysis, the NMFS likewise confirmed its "no jeopardy" conclusion in its Revised Opinion. While the Revised Opinion discusses blasting impacts in general terms and notes some potential adverse effects to essential fish habitat ("EFH"), NMFS ultimately concludes that, with the adoption of the recommendations and additional mitigative measures specified therein, the original Biological Opinion remains valid -- *i.e.*, that listed species will not be jeopardized and

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collected prior to construction in compliance with the § 401 WQC [referencing condition 7.E]; and noting that the NYSDEC has required Millennium to implement a Hudson River Sampling Plan that would be used during construction to monitor and adjust construction practices and mitigation measures to avoid water quality impacts to the maximum extent practicable); *id.* § 5.6.3, at 5-78 (discussing the FERC's Biological Assessment and noting that condition 7 in the § 401 WQC will minimize impacts from sedimentation and turbidity).

the impact to EFH will not significantly impair the functioning or vitality of the ecosystem. Millennium Exhibits 8 and 8A.

In light of these studies, there is clearly no merit to the NYSDOS's contention (NYSDOS Br. at 62) that the potential need for blasting in Haverstraw Bay has not been adequately studied. In that regard, the FERC properly rejected claims that a supplemental EIS should have been issued with respect to blasting in the Hudson River, noting both that the conditions set forth in its December 19, 2001 order require Millennium to file a work plan and obtain the approval of its blasting plan prior to any construction and that, in any event, all potential impacts from blasting have been fully explored and mitigated in the Supplemental BA/EFHA. Millennium Exhibit 1A, at 62,166-167.

Notably, the FERC's analysis in its Supplemental BA/EFHA confirms the propriety of its "no additional significant impact" determination. Millennium Initial Br. at 52-54. The analysis determines that (1) only 260 cubic yards of rock along the easternmost 185 feet of the Hudson River crossing will be implicated; (2) all overlying sediment will be removed with an environmental bucket; (3) there will be no sidecasting of spoil; (4) blasting, if required, will be performed in compliance with all applicable regulations; (5) boreholes will be placed and charges set to minimize impact; (6) blasting will be completed in a single episode, if at all possible; (7) fractured rock will be removed with a barge-mounted backhoe and stored on shallow-draft barges; and (8) the trench will be backfilled using spoil or fractured rock and capped with the original sediment to the approximate original elevation. Millennium Exhibit 6 at § 3.0.

Additionally, the FERC noted the extensive mitigation measures proposed by Millennium to minimize blasting impacts (*id.*) and found that potential direct impacts on the

shortnose sturgeon would be effectively mitigated. Millennium Initial Br. at 52-53.

Subsequently, the FERC adopted, *in toto*, the NMFS's recommendations for additional mitigation to further protect listed species and EFH. Millennium Exhibit 1A at 62,171-72, 61,184-85.

Consequently, effects on listed species and EFH from any blasting that may be required will be adequately minimized and will not significantly impair the Haverstraw Bay ecosystem.

Finally, the FERC's Supplemental BA/EFHA addresses and resolves other issues raised by the NYSDOS and other agencies regarding the potential need for blasting. Millennium Initial Br. at 54. The FERC's analysis

- Resolves the COE's concern about sidecasting of sediments, confirming that shallow water storage barges would be used and that "no excavated material is proposed to be sidecast on the river bottom;"
- Assesses, but rejects, the alternative proposed by the FWS that portable cofferdams be installed and blasting done "in the dry," noting feasibility concerns, worker safety issues, and the lack of any net environmental benefit;
- Acknowledges, but rejects, the NYSDOS's criticism that Millennium relied on literature and studies conducted in other water bodies, stating that such provided "the best available modeling to predict potential impact and identify proposed mitigation;" and

Rejects the NYSDOS's unsubstantiated conclusion that blasting would result in significant impacts to Haverstraw Bay.

Accordingly, the record before the Secretary plainly demonstrates that any limited amount of blasting that may potentially be necessary to install the pipeline near the eastern shore of the Hudson River will not result in impacts of any ecological significance.

### **(3) The Allegations Of Significant Adverse Effects On Haverstraw Bay Are Unfounded**

As previously discussed, the NYSDOS's allegations of long-term, permanent, ecologically significant impact to Haverstraw Bay are unsupported by the record. Millennium

Initial Br. at 39-63. More specifically, these allegations are not supported in the least by the so-called "expert" report of O'Brien & Gere Engineers (Villages Exhibit 2), which contains no independent evaluation of the facts, site-specific plans, site-specific conditions, or any other factors necessary for formulating a scientific, objective, competent opinion.

By way of example, consider the Report's "analysis" of Haverstraw Bay impacts. Villages Exhibit 2 at 6. While acknowledging that the FERC concluded that impacts would be "minimal," the OBG Report nevertheless opines, without any citation, analysis or explanation of any kind, that "it is certain that the project would have an adverse effect on the EFH and the aquatic species and physical characteristics of portions of Haverstraw Bay." *Id.* (emphasis added). Moreover, the Report fails to acknowledge the detailed Federal agency opinions finding that notwithstanding some adverse effects on EFH, listed species would not be jeopardized and the ecosystem as a whole would not be significantly impaired. The OBG Report reflects a cavalier disregard for objectivity and professionalism, and its "analyses" and "conclusions" should be treated accordingly.

The FERC and the DOE strongly support the Millennium Project and have urged the Secretary to override the NYSDOS's consistency objection. Based on the extensive analysis in the FEIS, BA, EFHA, Supplemental BA/EFHA, as well as other studies, the FERC and the DOE have concluded that impacts on Haverstraw Bay will be temporary and minimal. In light of these minimal coastal effects and the compelling national interest at stake, the FERC and the DOE have concluded that the balance weighs heavily in favor of the Project. They have therefore urged, most strenuously, that the Secretary should permit the Project to proceed.

The EPA has taken a neutral position on the Project. Comment Letter of the U.S. Environmental Protection Agency, dated January 2, 2003. However, the EPA has advised the FERC that it has no objection to the Project's approval, since the EPA's initial concerns respecting potential wetlands impacts have been addressed in the NEPA process and will be fully resolved in the Section 404 permitting process before the COE. *See* Millennium Exhibit 1A at 62,180 (quoting letter from the EPA dated December 7, 2001, stating that Millennium's wetlands mitigation plan "will go a long way towards addressing the [EPA's] concerns regarding the project's wetlands impacts" and that if "wetlands impacts caused by the project are fully mitigated through the [COE's] Section 404 process, the EPA will not object to the issuance of the 404 permit for the project").

Nevertheless, certain other Federal agencies have expressed concerns about the Millennium Project to the Secretary. While these concerns must be given consideration, they also must be put in their proper perspective, both as to the nature of the opinions expressed and the mistaken premise for the ultimate conclusions and recommendations. In all instances where agencies have expressed concerns respecting the Project, it is clear that they are operating under the erroneous assumption that alternative Hudson River crossing locations are feasible.

For example, consider the concerns expressed in the December 5, 2002 comments of NMFS. Its assertions of permanent or long-term ecologically significant impact are directly contrary to the NMFS's official Biological Opinion and Revised Opinion, and also are not supported by any other record evidence. In short, NMFS's comments provide no substantive assessment of Millennium's proposal and cannot supplant NMFS's official ESA/MSA Biological Opinion and Revised Opinion. *See Amoco Prod. Co.*, 1990 NOAA Lexis 49, \*53-56 (notwithstanding prior NMFS study finding significant adverse impacts to bowhead whales from

drilling activities, the "no jeopardy" conclusion in the ESA Section 7 Biological Opinion indicated that impacts were acceptable).

Further, NMFS's comments appear to be swayed by the belief that alternative Hudson River crossing locations are feasible. Thus, NMFS states, in pertinent part: "With respect to criterion three, reasonable available alternatives were not properly analyzed . . . . The State of New York and others indicate that alternative options exist. We also believe that a variety of viable options exist that would achieve Millennium's objective . . . [f]or example, a suitably-timed installation by Millennium [of an] alignment north of Haverstraw Bay (referred to as Hudson River North . . . . We contend that reasonable, partial route or system alternatives that would eliminate the habitat impairments created by Millennium's project are available NMFS comments at 3-4. However, there are no viable alternatives to the FERC-approved Hudson River crossing, and thus NMFS's suggestions to the contrary are misguided.

The concerns asserted by the COE, likewise, reflect the underlying premise that there are feasible alternatives, though there are not. Thus, the COE's comments (dated November 21, 2002) note that "alternatives recommended by DOS [ ] that would avoid the necessity for crossing the Hudson River could largely address [District Engineer Colonel John O'Dowd's] concerns." *See also* Attachment to COE's comments (letter dated August 13, 2002 from Colonel O'Dowd, stating "I note in their letter that DOS had outlined specific project alternatives which, if implemented, might permit the activity to be conducted in a manner consistent with the CZMA"). As is detailed below, however, and as the FERC found, there are no reasonable alternatives that would eliminate the need to cross the Hudson River. Moreover, as to the Hudson River crossing location, there are no reasonable, available alternatives to the FERC-approved Haverstraw Bay route.

The FWS's comments are based on the same erroneous notion that alternatives exist; thus, its recommendations must be considered in this context. *See* Letter from FWS to B. Blum, dated November 27, 2002 (attaching prior correspondence, including March 5, 2002 letter from FWS to COE, at 3, urging that "an alternative with fewer impact [should be] selected;" suggesting one-pipe alternative to the Eastchester pipeline; also attaching Memorandum dated October 29, 2001, urging alternatives to the Hudson River crossing, stating "the Service believes that practicable alternatives with fewer environmental impacts exist to transport gas ... to the stated delivery points"). The alternatives alluded to by the FWS have all been considered and rejected for valid reasons.

Finally, the FWS's recommendation (*i.e.*, to deny the permit) suffers from the additional defect that the underlying "analysis" misguidedly considers accidental occurrences totally out of proportion to their probability of occurrence. The FWS asserts impacts from pipeline leaks and ruptures, but fails to consider these potentialities in light of the extensive mitigation and monitoring measures to which Millennium has committed, and almost 15 years of data demonstrating the extreme reliability and safety of natural gas pipelines. While the FWS acknowledges that the FEIS "document[s] relatively low incidences of pipeline failure," it nonetheless concludes "that there is a significant risk of undetected failure in Haverstraw Bay." The only "evidence" to which the FWS cites is data collected in the Sea of Asov in 1982 and 1985. The FWS offers nothing, however, suggesting analogous conditions between the situation there and here -- be it with respect to, *inter alia*, pipeline construction techniques, the physical conditions in the surrounding environment, or pipeline protection, mitigation, and monitoring measures. In short, record support for the FWS's conclusion is plainly wanting; thus, its recommendation should be weighed accordingly.



In sum, several federal agencies strongly support the Project. As to those that have expressed concerns, overwhelming record evidence demonstrates the lack of ecologically significant impacts to Haverstraw Bay, and their misguided reliance on the belief that alternatives exist when, in fact, they do not.

**b.     The Project's Route Through The Village  
Of Croton-on-Hudson Will Not Result In  
Significant Adverse Coastal Effects**

The FERC-approved route through the Village of Croton-on-Hudson ("Croton") will not have any coastal zone impacts at all and no significant environmental impacts on the Jane E. Lytle Arboretum ("Arboretum") or Croton's wellfield (the "Wellfield"). *See* Millennium Initial Br. at 64-82. Moreover, the objections of the NYSDOS and Croton to the certificated route are factually and legally unsupported.

After an extensive analysis of alternatives, the FERC selected and approved the route through Croton as the "preferred" route through Westchester County. Millennium Initial Br. at 64; Millennium Exhibit 2, Vol. I, at 6-62. Notably, this route was initially endorsed by the Village (Millennium Exhibit 29), and the route through the Wellfield was selected by Croton's Engineer. Millennium Exhibit 78 (Baker Report), at 21

Both the Arboretum and the Wellfield are located more than a mile inland from the Hudson River, but Croton has nevertheless designated all areas within its boundaries, including the Arboretum and the Wellfield, as part of the coastal zone. While impacts on the Arboretum and the Wellfield must thus be considered, there is no basis for the contentions of the NYSDOS and Croton that any impacts whatsoever are unacceptable. *See Union Oil Co. of California*, 1984 NOAA Lexis 16, \*45-47 (Nov. 9, 1984) (rejecting the state's contention that a



low risk of harm to an endangered species precluded an override); *Texaco, Inc.*, 1989 NOAA Lexis 32, \*34-44 (May 19, 1989) (noting that "[i]t is indisputable that there is always some risk of an oil spill during oil and gas operations").

Moreover, and contrary to Croton's criticisms, it is entirely proper to consider the lack of any significant effect on true coastal resources that would result from the installation of the pipeline across the Arboretum and the Wellfield. *See Mountain Rhythm Resources v. FERC*, 302 F.3d 958, 964-965 (9th Cir. 2002). Clearly, Croton's claims that the Project would significantly affect true coastal resources are baseless.

In the final analysis, the Project will not significantly affect Croton's true coastal resources, as explained below. Further, to the extent that there may be any *de minimis* impact, such effects are decidedly outweighed by the compelling national interest served by the Project.

**(1) The Project Will Result In No Significant  
Adverse Effects On The Arboretum**

In its initial brief, Millennium responded to the sole and exclusive issue that was raised in the NYSDOS's objection with regard to the Arboretum -- the claimed adverse effect of pipeline construction on wetland WO8CT, a part of which occupies most of the central portion of the Arboretum. *See* Millennium Exhibit 10, at 14-15; Millennium Initial Br. at 66-67.

Croton claims that Millennium's focus on that wetland somehow shows that all other potential effects on the Arboretum have been ignored. *Villages Br.* at 47 n. 188. That is untrue. The FERC's FEIS specifically addresses, *inter alia*, potential recreational, scenic (*i.e.*, visual), and wildlife effects on the Arboretum, and demonstrates the lack of any significant impact. *See* Millennium Exhibit 2 at 6-55 to 6-57 (discussing "recreation areas and trail

crossings" generally, and specifically discussing the Arboretum loop/spur trail); *id.* at 6-57 (discussing visual effects and noting that locating the pipeline 35 feet closer to ConEd's conductors would minimize tree clearing and, hence, visual impacts); *id.* at 6-40 (discussing wildlife/habitat effects and ways to minimize any potential effects); *see also id.* at 6-38. Furthermore, the FERC's final order reaffirms the analysis in the FEIS (*see* Millennium Exhibit 1A at 62,178-79), and no Project opponent has provided any substantive evidence that undermines the FERC's conclusion. Because the FERC-approved route in the vicinity of the Arboretum is immediately adjacent to a cleared ConEd powerline right-of-way that is 150 feet wide and is occupied by many 100-foot electric transmission towers, the notion that the Millennium Project will somehow create "new" scenic and recreational impacts is preposterous.

Likewise, the record firmly demonstrates that the Project will also not significantly impact the Arboretum's wetlands. Millennium Initial Br. at 66-70. Both the FEIS and the FERC's orders confirm that, while there will be a very minor loss of wetland habitat, the functional viability of wetland WO8CT will not be impaired and net wetland loss will be insignificant as a result of:

(1) the small total area affected by pipeline construction and operation -- (a) no more than 0.23 acres of Arboretum wetland will be in the proposed construction area, (b) no more than 0.79 acres of Arboretum wetland will be affected at all by the construction, (c) only 0.27 acres of Arboretum wetland will be affected during operations, and (d) no more than 0.11 acres of wetland WO8CT will be converted from palustrine forest to emergent vegetation;

(2) the extensive construction mitigation measures to which Millennium has committed -- (a) constructing the Arboretum crossing as a single construction entity and limiting construction activity to a two-week period and earth moving activity to two days, (b) limiting the width of the workspace, (c) reducing tree clearing as much as possible, (d) employing best management practices and sediment/erosion control measures, (e) performing stream crossings with dry ditch techniques, (f) employing an environmental inspector to monitor compliance with Environmental Construction Standards, (g) employing a full-time environmental monitor on-site to monitor and report to regulatory agencies respecting all stream and wetlands issues, and (h)

documenting all swales and drainage courses prior to earth-moving activities to ensure that final grading conforms to pre-existing grades and contours;

(3) the post-construction restoration measures that Millennium will implement to restore original wetland contours and ensure consistency with original hydrologic patterns to the maximum extent practicable, to restore the right-of-way to pre-construction grade, and to stabilize the right-of-way using a wetland seed mixture, and to perform tree and shrub planting in consultation with Arboretum representatives; and

(4) the post-construction maintenance and protective measures that Millennium will implement to remedy already existing problems with invasive plant species (*e.g.*, *Phragmites australis*) and prevent further encroachment. *See* Millennium Initial Br. at 68-70; Millennium Exhibit 1A at 62,180 (addressing wetlands generally).<sup>33</sup>

In its brief, Croton advances the same concerns that it has asserted since the very beginning of the environmental review process. Despite Millennium's dedicated efforts to address those issues, Croton disingenuously maintains that Millennium has ignored its concerns. However, Millennium's proposed mitigation measures, continued consultations with the NYSPSC (*i.e.*, to move the pipeline path closer to electrical conductors to further minimize Arboretum impacts), and repeated consultations with Arboretum representatives most decidedly belie Croton's assertion that Millennium has treated these concerns cavalierly. *See* Millennium Initial Br. at 68-70; *see also* Millennium Exhibit 1A at 62,178-79 (addressing Croton's concerns regarding alleged Arboretum impacts).

Millennium has not only considered all of the Arboretum issues, but has also effectively resolved them. As previously noted, Millennium has committed to extraordinary

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<sup>33</sup> For the very same reasons -- *i.e.*, the extensive avoidance, mitigation, restoration, maintenance and protective measures to which Millennium has committed to protect and enhance the Arboretum's wetlands, waters, and related resources -- pipeline construction and operation in the vicinity of the Arboretum will also not negatively affect any true coastal resources with which the Arboretum may be hydraulically "linked." In short, there will no significant impact on the Arboretum. Thus, even if Croton is correct in claiming that "there is a direct watershed link between the Arboretum . . . and coastal resources," that contention in no way supports Croton's unsubstantiated conclusion that this "means [ ] the proposed pipeline will also have an impact on other coastal waters and resources." *See* Villages Br. at 44.

avoidance, mitigation, restoration, maintenance, and protective measures that will render any potential adverse impacts on the Arboretum *de minimis*. Millennium Initial Br. at 68-70. Indeed, it is Croton, not Millennium, that has adopted a position of selective ignorance -- *i.e.*, by improperly failing to acknowledge, let alone assess, the numerous impact minimization and restoration measures that Millennium has proposed as fundamental components of the Project.

Rather than face these facts, Croton misguidedly presents its impacts analysis as if in a vacuum, through the OBE Report. *See* Villages Exhibit 2. However, the OBG Report is at best inaccurate, and its conclusions are unfounded and unsustainable.

Further underscoring the inherently suspect nature of the OBG Report is the fact that no individual has claimed authorship for, or professionally endorsed, it, and it is bereft of independent review and objective analysis. It appears that O'Brien & Gere did nothing more than adopt as its own the foregone conclusions of its client, Croton. The Report adopts erroneous "factual" premises, fails to ground-truth assumptions, draws sweeping conclusions without the benefit of study or authoritative citation, and, just like Croton, fails to factor into its so-called "analysis" the specific impact minimization measures to which Millennium has committed. *See, e.g.*, Villages Exhibit 2 at 10-12. The Report thus lacks any semblance of professionalism and cannot legitimize Croton's claims of impact to the Arboretum, the Wellfield, or Haverstraw Bay.

By way of example, the OBG Report states that "the proposed route, as approved, will traverse an approximate 100-foot swath of the northern portion of the Arboretum . . ." *Id.* at 10. This is simply wrong. Millennium has proposed a much narrower, 50-foot-wide right-of-way for construction adjacent to the Arboretum. In addition, Millennium will reduce impacts on the Arboretum still further by moving the pipeline 35 feet closer to the electric towers, thus

placing most of the proposed construction on the already cleared ConEd right-of-way, rather than within the Arboretum. Millennium Exhibit 1A, at 62,178; Millennium Initial Br. at 68. O'Brien & Gere's factual errors thus result in a severe overstatement of impacts on the Arboretum.

The OBG Report compounds its factual errors by advancing unsubstantiated claims of greater impacts to forest habitat. The Report states that the removal of mature upland and wetland forest will "include a degradation of interior forested habitat along the pipeline route in the Arboretum and other sensitive nearby resources . . . The impact to interior forested habitat from clear cutting may extend 300 feet from the edge of the clear cut, which translates to an impact on interior forest habitat at the Arboretum property of approximately 5 acres, or 25% of the property." Villages Exhibit 2 at 1 The only citation provided for this alleged enhanced-impact effect is an undisclosed, unspecified personal communication/correspondence. Thus, the Report's claim of impact to 25% of the Arboretum's property is patently unsubstantiated and plainly overstated -- both because it assumes a construction right-of-way at least twice the width of what will actually be required and relies on an unsupported view that habitat impacts will extend well beyond the affected area.

Moreover, even if the alleged effect were true, it would already exist by virtue of the existing ConEd right-of-way. Disregarding Millennium's proposal to merely widen the existing ConEd corridor for the majority of the construction through this area, the OGB Report claims that Millennium's right-of-way will, apparently on its own, affect 25% of the Arboretum. Obviously, Millennium's approach of taking into account the existing environment in its analysis and impact assessment (*i.e.*, using existing conditions as a baseline is well grounded. Certainly, it is improper for O'Brien & Gere to ignore already-existing conditions and to attempt, instead, to attribute impacts from those extant conditions to the Millennium Project. This is yet another

example of the OBG Report's overstatement of potential impacts from the Project and its failure to conduct sufficient (or any) fieldwork to substantiate its claims.

Beyond its plainly unsubstantiated statements respecting impact, the OBG Report fails to consider any of the extensive and comprehensive mitigation, restoration, maintenance, and protective measures to which Millennium has committed. *Contrast* Millennium Initial Br. at 68-70 *with* Villages Exhibit 2 at 10-12. Allegations of increased stream and surface water flow and disruption of drainage patterns ignore Millennium's commitment to restore original wetland and right-of-way contours. Claims of increased erosion ignore the FERC's requirements that Millennium must comply with the Environmental Construction Standards, retain independent inspectors and monitors on-site to ensure performance, and implement restoration measures in consultation with Arboretum representatives. Concerns regarding invasive species ignore Millennium's commitments to undertake related mitigation, implement protective measures, and implement a maintenance program to remedy already-existing problems with invasive species and prevent their further encroachment.

Nor is there any basis for the OBG Report's claim that the Arboretum's "unique educational experience" and "established educational curricula" will be disrupted, "both long- and short-term," by the Project. Installation of the pipeline in the vicinity of the Arboretum will be completed in just two weeks, will be confined to an extremely small area along the northern edge of the Arboretum (most construction activities will occur within the Con Ed right-of-way, not within the Arboretum), and will be implemented with all measures necessary to ensure that impacts to the Arboretum are minimized. Given the small area involved and the extremely short duration of construction activities, it is ludicrous for the OBG Report to assert that there will be a

long-term disruption of the Arboretum's educational curricula. In fact, there will be no impacts of any significance.

In addition, Croton argues that the Secretary cannot override a state agency's objection to a project if there is any adverse effect on, or destruction of, existing wetlands. Villages Br. at 44-47. Contrary to Croton's contention, however, its suggested "no impact" test is not the legal standard to be applied in this case. See *Union Oil Co.*, 1984 NOAA Lexis 16, \*45-47; *Texaco, Inc.*, 1989 NOAA LEXIS 32, \*34-44. Indeed, CZMA precedent makes it clear that the Secretary may override an objection even in the face of wetland loss, particularly where adequate wetlands mitigation has been proposed. E.g., *Jesse M. Taylor*, 1997 NOAA Lexis 19 (December 30, 1997); *Virginia Elect & Power*, 1994 NOAA Lexis 31, \*120-124; *Southern Pacific Transportation*, 1985 NOAA Lexis 73, \*22-35 (involving permanent, long-term adverse effects on a salt marsh, including "sedimentation over about 100 acres of salt marsh and some conversation of wetlands to fastlands"). Accordingly, the attempt of Croton and the NYSDOS to insinuate a "no impact" rule -- and effectively ignore Millennium's wetlands mitigation proposals -- must be rejected. See *Jesse M. Taylor, supra*; *Virginia Elec. & Power, supra*; see also Millennium Exhibit 1A at 62,180 ("compliance with the wetland mitigation plan that will be a part of the Section 404 permit will adequately address wetlands issues").

Also without merit is the NYSDOS's contention that the present lack of a final site-specific plan for the Arboretum requires a conclusion that wetlands will be adversely affected (NYSDOS Br. at 75) -- particularly when the NYSDOS never requested any information from Millennium regarding the plan for construction in the vicinity of the Arboretum. The FERC has explained that it allows final site-specific plans to be deferred until prior to construction in order "to allow the applicant to respond to engineering and construction issues



that typically arise in the field .” Millennium Exhibit 1A at 62,153. With respect to the Arboretum, the site-specific plan will be designed to minimize the construction corridor in the Arboretum, minimize tree clearing, and implement a reseeding/replanting and invasive species control plan in accord with the wishes of Arboretum representatives. The FERC’s deferral of site-specific plans has been judicially approved and, in any event, the NYSDOS has failed (1) to identify a single measure that it deemed to insufficiently protective of the Arboretum environment, (2) to engage in any actual analysis of Millennium's proposed construction, restoration and mitigation plans, (3) to specify any particular impact arising from a deficiency in these plans, or (4) to identify any additional measures that would further reduce impacts. Millennium Initial Br. at 78-80.

**(2)     The Project Will Result In No Significant  
Adverse Effects On Croton’s Wellfield**

The record amply demonstrates that there will be no effects of any significance to Croton’s Wellfield from pipeline construction or operation. Millennium Initial Br. at 70-74. The *de minimis* nature of potential effects to the Wellfield is attributable to a combination of factors -- the physical setting, the high permeability of the aquifer, the location of the pipeline, and the extensive and comprehensive protective measures to which Millennium has committed. *Id.*; *see also* Millennium Exhibit 1A at 62,179. In particular, the FERC’s FEIS, the LMS Study Addendum, and the Section 401 Water Quality Certificate provide persuasive evidence that the Millennium Project will not impair the Wellfield’s water yield, water quality, or expansion potential. Millennium Initial Br. at 70-74.

In a futile attempt to substantiate its allegations of significant adverse impacts on the Wellfield, Croton relies on the OBG Report. However, the OBG Report merely parrots

(without any analysis) the exact same concerns regarding the Wellfield that have been asserted by Croton from the beginning of the environmental review process -- namely (1) alleged 1) construction impacts from trench dewatering, contaminant releases, and blasting, (2) alleged reductions in Wellfield expansion options, and (3) alleged pipeline operational impacts from contamination. *See Villages Br. at 37-44; Villages Exhibit 2 at 7-10.*

Moreover, as explained below, Millennium has comprehensively addressed and resolved each and every one of the Wellfield issues raised by Croton. Millennium Initial Br. at 70-74. Significantly, the FERC concurred in that analysis and concluded that there would be no impacts of significance to the Wellfield. Millennium Exhibit 2, Vol. I, at 6-33 to 6-35; Millennium Exhibit 1A at 62,179-80. Given the thorough review of Wellfield issues and the extensive mitigation/protective measures to which Millennium has committed, it is plainly disingenuous for Croton to claim that Millennium "ignored [its] concern about water supplies." *See Villages Br. at 41.* Indeed, it is Croton (not Millennium) that has "ignored" key factors.

In the first place, trench dewatering does not pose the potential for any significant impact on the Wellfield. Millennium Initial Br. at 71, 73. In fact, impacts are "extremely unlikely" due to the location of the Wellfield in a deep deposit of sand and gravel near the Croton River. *See id.*; Millennium Exhibit 1A at 62,179. This aquifer consists of multiple lateral flow paths at a considerable distance below the ground surface and contains substantial volumes of ground water. *Id.* These features render it highly unlikely that trench construction could intercept, or otherwise affect, the primary flow pattern within the aquifer. *Id.* The FERC not only found the probability of impact to water quantity from trench dewatering to be "extremely unlikely," but, to further minimize any potential for impact, it also directed that the construction window be restricted to coincide with seasonal low flow periods (*i.e.*, when the aquifer elevation

is at its lowest). *Id.*; *see also* Millennium Exhibit 2, Vol. I, at 6-35. Additionally, Millennium has committed to use concrete-coated pipe (as recommended by its expert, Baker Engineering) to obviate any need to dewater the trench at all. *See* Millennium Exhibit 78 at 21. Thus, Millennium has fully assessed and resolved all concerns pertaining to trench dewatering.

Millennium has likewise resolved issues pertaining to the Wellfield's water quality -- *i.e.*, concerns respecting contaminant releases into the aquifer from "spills or leaks during construction and operation of the pipeline."<sup>34</sup> Thus, Millennium adopted conservative Environmental Construction Standards, agreed to include Croton's Wellfield Protection Zone in its Spill Prevention, Control, and Countermeasures Plan, committed to utilize the FERC's Plans and Procedures, and committed to monitor the pipeline continuously during operations to detect leaks through pressure monitoring, aerial and ground reconnaissance, and automated, remote-controlled robotic devices. Millennium Initial Br. at 72-73; Millennium Exhibit 2, Vol. I, at § 5.3 Croton fails to even acknowledge these protective measures, let alone to suggest that they are not sufficiently protective of the Wellfield. *See* Villages Br. at 41-42; Villages Exhibit 2 at 8-10; *Texaco, Inc.*, 1989 NOAA Lexis 32, \*25-26 (noting applicant's "extensive" mitigation and the state agency's failure to suggest any additional mitigation).

Moreover, the risk of contaminant release into the Wellfield during pipeline operations is extremely remote, as the Baker Report concludes. Millennium Exhibit 78 at 21. It is highly unlikely that a pipeline leak will occur in the Wellfield, given the high level of material

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<sup>34</sup> *Contrast* Villages Br. at 41-42 & Villages Exhibit 2 at 8-10 (providing no actual analysis of Millennium's proposed construction standards, SPCC Plan, or monitoring plans but nevertheless concluding that there will be significant impacts merely because the aquifer is permeable and the groundwater table is allegedly shallow in certain locations) *with* Millennium Initial Br. at 72-73.

and workmanship testing that will be conducted, including a final hydrostatic test of the pipeline before it is placed in service.

O'Brien & Gere's insinuation that the odorant in Millennium's pipeline will somehow contaminate the Wellfield is also unfounded. The odorant required by law for safety purposes is a vapor in the natural gas stream, is not soluble in water, and is not toxic if breathed. In the very remote event of a pipeline leak, the odorants will dissipate into the atmosphere.

O'Brien & Gere's suggestion that natural gas in Millennium's pipeline could contaminate the Wellfield is also baseless. New gas pipelines develop leaks very infrequently. Moreover, any leaks would develop very slowly and would be easily detected. Furthermore, any gas be released would be virtually insoluble in water and would rise in porous soils and dissipate into the atmosphere, contrary to the OBG Report. Finally, the likelihood of any release of fluids from Millennium's pipeline is highly unlikely.

Croton's further assertion that blasting "could affect the water quality and efficiency of the supply wells" (Villages Exhibit 2 at 9) is pure speculation since, as the FERC has noted, "[b]ecause of the[ ] deep soils, Millennium does not anticipate that blasting would be necessary near this public water supply wellfield." Millennium Exhibit 2, Vol. I, at 6-34. In fact, geotechnical data, including bore logs from the wells, show that the bedrock is over 68 feet deep, far below the depth needed for pipeline installation.

Also unsupported is Croton's claim that the Wellfield's expansion potential will be impaired by the Millennium Project. Villages Br. at 43; Villages Exhibit 2 at 9. To resolve Croton's concerns regarding future expansion of the Wellfield, Millennium agreed has to unilaterally bury the pipeline with additional cover (a minimum of eight feet) to prevent possible

interference with future water lines. Millennium Initial Br. at 73. In addition, Millennium has proposed to route the pipeline through the shallow zone in the northern part of the aquifer, not in the deeper zone in the southern end of the Wellfield where the greatest potential for future development exists. *Id.* at 71. In any event, new wells could be drilled anywhere that was not within 25 feet of the pipeline. Given this limited drilling restriction and the detailed pipeline design drawings and location information that will be made available to Croton, virtually the entire Wellfield will remain available for future development. Hence, the OBG Report's claim that the drilling restrictions "may result in impacts to the ability of the Village to meet future water supply needs" is plainly hyperbole.

Croton's legal arguments regarding Wellfield impacts are also wrong. Continuing to advance its "no risk" standard, Croton claims that CZMA precedent stands for the proposition that any risk of accident to a natural resource requires the Secretary to sustain a state agency's objection. *See Villages Br.* at 42-43. This is simply not true. In his CZMA decisions, the Secretary has reasonably acknowledged that the risk of any particular event is never zero and that zero risk is not required to override a state agency objection. *See, e.g., Texaco, Inc.*, 1989 NOAA Lexis 32, \*34-44 ("[i]t is indisputable that there is always some risk of an oil spill during oil and gas operations"). *Union Oil Co.*, 1984 NOAA Lexis 16, \*45-47. Instead, risks are evaluated with reference to the likelihood of their occurrence and the probable magnitude of their impacts. *Mobil Oil*, 1995 NOAA Lexis 37, \*66 & \*71 (June 20, 1995); *Texaco, Inc.*, *supra*, \*32-44; *Gulf Oil Corp.*, 1985 NOAA Lexis 1, \*32 (Dec. 23, 1985); *Union Oil of California*, 1984 NOAA Lexis 16, \*21-34 (Nov. 9, 1984). Where, as here, the risk is extremely low and the national interest served by the Project is compelling, the Project should be permitted to proceed.

Likewise without merit is Croton's attempt to read *Virginia Elect. & Power Co.* for the proposition that an inability to satisfy a "no risk" standard "requires re-routing the pipeline out of the Wellfield." Villages Br. at 40, n.97. Contrary to Croton's suggestion, in *Virginia Elect. & Power Co.*, the Secretary applied the exact same "magnitude of risk times probability of risk" standard with respect to drinking water supply. In this case, Millennium has never disputed the value of drinking water sources or the need to vigorously protect Croton's water supply. Indeed, Millennium has adopted extensive avoidance, mitigation and protective measures for the construction and operation of the pipeline. As a result, the remaining potential for adverse impact to the Wellfield is *de minimis*, and that is what is relevant here.

Finally, Croton claims that a crossing of the Wellfield must not be permitted because it is "a violation of the Local Law and the LWRP's policy." Villages Br. at 39. As the FERC has noted, however, the Natural Gas Act "preempts state and local law to the extent the enforcement of such laws or regulations would conflict with the Commission's exercise of its jurisdiction under the federal statute."<sup>35</sup> A local government like Croton may challenge a FERC decision through an appeal to Federal appellate courts, but it may not use its regulatory power to challenge a FERC decision.<sup>36</sup>

In its September 18, 2002 order, the FERC reiterated its conviction that Croton's water supply would not be adversely affected by the Millennium Project. Noting that Croton's aquifer "consists of multiple lateral flow paths at some distance below the ground surface," the FERC reasoned thusly (Millennium Exhibit 1A, at 62,179):

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<sup>35</sup> *Iroquois Gas Transmission System, L.P.*, 59 FERC ¶ 61,094 at 61,360 (1992).

<sup>36</sup> *Maritimes & Northeast Pipeline, L.L.C.*, 81 FERC ¶ 61,166 at 61,728-31 (1997).

“[W]e do not believe that pipeline trench construction could intercept or otherwise affect the primary flow patterns within the aquifer. Furthermore, in the unlikely event that flow were intercepted, we do not think that the impact could affect the overall water supply of Croton-on-Hudson. Nevertheless, to further reduce what we consider to be an extremely unlikely outcome, we restricted the construction window to coincide with seasonal low flow periods and what would typically be a time of the year that experiences lower ground water elevations.”

Millennium respectfully submits that the Secretary should concur in that conclusion.

**c.      The New Croton Watershed And The Catskill  
Aqueduct Are Not In The Coastal Zone And, In  
Any Event, Will Be Adequately Protected**

It is Millennium’s position that the pipeline route through the New Croton Watershed (the “Watershed”) and across the Bryn Mawr Siphon (“Siphon”) of the Catskill Aqueduct (“Aqueduct”) does not fall within the coastal zone jurisdiction of the NYSDOS because those locations are far inland and many miles away from the coastal zone. Because the NYSDOS never once during its four-year review process identified the crossings of the Watershed or the Aqueduct as issues to be addressed in any way by Millennium or to be considered at all in the NYSDOS’s consistency analysis, moreover, the NYSDOS’s objection to those crossings was obviously inappropriate as a matter of fundamental fairness. The NYSDOS’s objection to those portions of the Millennium Project should thus be disregarded as a matter of law. In any event, as the FERC found, the Project’s potential impacts to the Watershed and the Aqueduct will be *de minimis*.

**(1)      The Crossings Of The New Croton  
Watershed And The Catskill Aqueduct  
Are Not In the Coastal Zone**

Pursuant to CZMA § 307, the NYSDOS’s consistency analysis was only permitted to consider the Millennium Project’s bona fide “coastal effects” (*i.e.*, effects on a



coastal use or coastal resource -- land use, water use, or natural resource, within the designated coastal zone). CZMA § 307(c)(3)(A), 16 U.S.C. § 1456(c)(3)(A); 15 C.F.R. §§ 930.11(b) & (g). If and to the extent that any such "coastal effects" were identified, moreover, the NYSDOS was required to find that the Project failed to "compl[y] with the enforceable policies of the state's approved [coastal management] program." CZMA § 307(3)(c)(A), 16 U.S.C. § 1456(3)(c)(A). Finally, the NYSDOS's policies are "enforceable" only within the boundary limitations specified in the New York's coastal management program. *See* CZMA § 304(6a), 16 U.S.C. § 1453(6a). Thus, portions of the Millennium Project located outside the coastal zone boundaries could be considered in the NYSDOS's consistency analysis only if they would have genuine coastal effects (*i.e.*, land use, water use or natural resource effects in the coastal area).

In this case, the NYSDOS has not identified any specific "coastal effect" likely to result from the proposed route through the Watershed and across the Aqueduct, both of which are located in inland, upland areas. Instead, the NYSDOS advances the generalized, unsubstantiated claim that the Bryn Mawr Siphon is part of the infrastructure of water supplied to New York City, and thus "any activity affecting the Siphon would have effects on the land and water resources of New York's Coastal Area." NYSDOS Br. at 25. This self-serving statement -- which is bereft of any record support and belied by the uncontroverted fact that there is no hydrological, biological, physical or other resource-related connection between this piped-in water source and coastal area resources -- does not, and cannot, accord NYSDOS jurisdiction over this inland portion of the Millennium Project.

**(2) In Any Event, The New Croton  
Watershed And The Catskill Aqueduct  
Will Be Adequately Protected**

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To the extent that the Project's impact on the New Croton Watershed and Catskill Aqueduct is in any way relevant in this appeal, the objections voiced by the NYSDOS are without merit. The plethora of redundant protective measures to which Millennium has committed demonstrate that there will be no adverse effects on either the Watershed or the Aqueduct.

**New Croton Watershed**

The FERC's orders properly concluded that any effects of pipeline construction and operation within the New Croton Watershed will be *de minimis*. See Millennium Initial Br. at 91-92; Millennium Exhibit 1 at 62,333-34; Millennium Exhibit 1A at 62,175-76. Moreover, generalized concerns regarding potential adverse effects on the alleged "pristine water supply lands located in the New Croton Reservoir Watershed" (NYSDOS Br. at 71-72) are unfounded in light of the physical realities of the proposed construction and the extensive mitigation measures to which Millennium has committed. In particular, the proposed pipeline construction will only cross about 2.5 miles of the Watershed near its western edge and will affect less than seven one hundredths of one percent (0.07%) of the Watershed's area. Millennium Exhibit 1 at 62,333.

In addition, the vast majority (89%) of the soils in the construction right-of-way within the Watershed have a slight or no erosion hazard and more than a mile separates the construction right-of-way from the New Croton Reservoir, with numerous intervening water bodies that will act as potential natural sinks for any sediment carried offsite by stormwater. Millennium Exhibit 1A at 62,175. Moreover, Millennium has committed to extensive

construction mitigation measures to protect all waterbodies from direct or indirect construction-related impacts due to stormwater generally and to minimize any potential effects on the Watershed and the public water supply. See Millennium Initial Br. at 91-92; Millennium Exhibit at 62,333-34; *see also* Millennium Exhibit 1A at 62,175-76.

In sum, as the FERC concluded, water quality impacts on the New Croton Reservoir Watershed will be *de minimis* as a result of

- the very small area affected by the construction;
- the distance between the construction right-of-way and the Reservoir;
- the nature of the soils within the construction area;
- Millennium's Environmental Construction Standards;
- Staff's Upland and Erosion Control, Revegetation, and Maintenance Plan;
- Staff's Wetland and Waterbody Construction and Mitigation Procedures;
- proper maintenance of erosion control measures;
- the lack of any "clear and direct pathway for sediments from the project area to reach the Reservoir;"
- Millennium's commitment to comply with all local construction/watershed requirements;
- Millennium's commitment to hire a third-party contractor and independent environmental monitors and inspectors; and
- the requirement that Millennium expand its Spill Prevention, Containment and Control Plan to specifically include reasonable state and local requirements concerning construction in public water supply watersheds.<sup>37</sup>

Accordingly, the FERC rightly concluded that the mitigation conditions it imposed "address the NYCDEP's concerns" regarding watershed impacts. Millennium Exhibit 1 at 62,333-34.

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<sup>37</sup> Millennium Exhibit 1 at 62,333-34; Millennium Exhibit 1A at 62,175-76; Millennium Exhibit 2, Vol. I, at 6-35 to 6-37.

Further, and contrary to Cortlandt's contentions (Cortlandt Br. at 40), the FERC did not "concede" that the Millennium Project would result in measurable phosphorus impacts to the New Croton Reservoir, nor are there any "undisputed CWA violations." Rather, the FERC concluded that the phosphate TMDL criteria presented no impediment to Project approval. Millennium Exhibit 1A at 62,175-76. First, the FERC found that "the likelihood of construction activities generating quantifiable levels of soil-bound phosphorus was minimal." *Id.* at 62,175. Second, even if quantifiable levels of soil-bound phosphorus were generated, the FERC determined that erosion control measures, together with the distance between the construction area and the Reservoir, made it "unlikely" that any phosphorus in eroded soils would enter the Reservoir. *Id.* Third, even if quantifiable levels of soil-bound phosphorus were generated and even if Millennium's erosion control measures failed for some reason, the FERC found that "the distance from the construction areas to the reservoir is substantial enough to conclude that sheet runoff of soil into the reservoir is not a possible sediment transport mechanism." *Id.* (emphasis added). The FERC therefore concluded that "conveyance of soil-bound phosphorus to the reservoir would be unlikely due to the length and nature of the available pathways" any phosphorus contribution to the Reservoir from the construction would be "minimal, temporary and indiscernible." *Id.* at 63,175-76 (emphasis added). Thus, FERC has not conceded that there would be any measurable phosphorus loading, and there is certainly no "undisputed CWA violation."

Consequently, to the extent (if any) that alleged impacts on the New Croton Reservoir Watershed (and, hence, the New York City water supply) are considered by the Secretary, it is clear that the Project will not have any measurable adverse effects.

### **The Catskill Aqueduct**

Likewise, the Project will not adversely affect the Bryn Mawr Siphon of the Catskill Aqueduct. Millennium Initial Br. at 92-94; *see also* Millennium Exhibit 1A at 62,176. In opposing Millennium's appeal, the NYSDOS relies on the concerns initially asserted by the NYCDEP -- an alleged risk of adverse effects on the Siphon and Aqueduct from pipeline construction, the potential for operational accidents, and the threat of terrorism. *See* NYSDOS Br. at 71-72; New York City Br. at 2-4, 6-8. Notwithstanding the contentions of the NYSDOS and the NYCDEP, all of these issues have been fully considered, addressed, and resolved by the FERC.

In the first instance, the record demonstrates that the Millennium Project does not pose a reasonably foreseeable risk of adverse impact on the Siphon and the Aqueduct. In any event, however, the FERC's orders fully accommodate all of the NYSDOS's and NYCDEP's concerns -- not only by requiring that construction of the Project cannot commence until a site-specific crossing design has been developed in cooperation with (and under the direction of) the NYCDEP, but also requiring the approval of the COE.

It cannot be overemphasized that Millennium has committed to employ extraordinary safety measures to ensure pipeline integrity and, thereby, protect the Aqueduct and the Siphon. Millennium Initial Br. at 92-93. Thus, Millennium developed a "conceptual" crossing plan in which it agreed to (1) construct a steel-reinforced concrete barrier between the pipeline and the Aqueduct to withstand the maximum pressure resulting from a pipeline rupture; (2) install supporting concrete columns to bedrock so that forces from any potential rupture would be transmitted to, and absorbed by, the bedrock, and not the Aqueduct; (3) install heavy wall, high tensile steel pipe at the crossing with design factors exceeding Federal requirements;

and (4) use a telemetry system to continuously monitor the pipeline crossing for pressure changes. *Id.* at 93; Millennium Exhibit 2, Vol. I, at 5-63.

To guard against the possibility of a pipeline rupture during operation, Millennium also agreed to a number of safety features as part of overall pipeline design, including (1) utilization of the latest, state-of-art cathodic protection system (to guard against corrosion), (2) utilization of permanent launchers and receivers with intelligent "pipeline pigs" to check pipeline integrity, and (3) performance of periodic patrols in the vicinity of the crossing to prevent encroachment. As a further measure to ensure protection of the Siphon and Aqueduct during pipeline operation, Millennium also committed to an increased pipe thickness and extremely protective monitoring requirements. *Id.*

To minimize any potential construction effects, including the NYCDEP's concerns regarding blasting and proximity to the Aqueduct, Millennium has also agreed to additional protective measures. For example, Millennium will (1) follow all of the NYCDEP's construction guidelines; (2) perform no blasting within 150 feet of the crossing site; (3) adhere to the 10-ton load limit requested by the NYCDEP when crossing the Aqueduct with equipment; and (4) provide advance notice to the NYCDEP of construction activities at the crossing site to accord the NYCDEP the opportunity to monitor the installation of the pipe and concrete structures. *Id.*

Thus, the risk posed by the Project to the Aqueduct was comprehensively reviewed by the FERC; Millennium committed (and remains committed) to do what is necessary to protect the Aqueduct during pipeline construction and operation; and the FERC fully assessed the potential risks in light of the adopted protective and mitigative measures. Based on this thorough assessment, the FERC properly concluded that an engineering solution to the Aqueduct

crossing at the Bryn Mawr Siphon is possible and that the crossing of the Aqueduct presents no impediment to Project approval. *See* Millennium Initial Br. at 93-94; Millennium Exhibit 1 at 62,334-35; Millennium Exhibit 2, Vol. I, at 5-62 to 5-65.

In addition to conducting this comprehensive review, the FERC went even further to ensure that all of the NYCDEP's concerns would be fully resolved before any construction could commence. Thus, the FERC has required Millennium to reach a mutually agreeable solution with the NYCDEP regarding the engineering design for the Aqueduct crossing. Millennium Exhibit 1 at 62,335-36 & n.92; Millennium Exhibit 1A at 62,176. Moreover, the FERC has required the site-specific crossing design to be independently reviewed by a consultant of the NYCDEP's choosing, to be developed in cooperation with the NYCDEP, and also to be reviewed and approved by the COE before construction may commence. Millennium Exhibit 1 at 62,335-36; Millennium Exhibit 1A at 62,176.

Notably, it was the NYCDEP that originally sought the COE's assistance in reviewing Millennium's plans for the Aqueduct crossing. *See* New York City Br. at 8. As a result of this request, the COE is presently conducting a security investigation of the proposed crossing. *Id.* Although no reports or recommendations have yet been issued, the COE requested that it be allowed to participate in a further review of Millennium's site-specific crossing plan, the consideration of any alternative locations, and an independent engineering assessment of the crossing plan. As noted, the FERC not only granted this request, but also required that the site-specific crossing plan be filed with, and approved by, the COE. Millennium Exhibit 1 A at 62,176. Thus, the NYCDEP's concerns about an allegedly "precarious design" and proximity to the Aqueduct will be resolved prior to pipeline construction, with its full oversight and input and the approval of the COE. Consequently, engineering design concerns respecting the Aqueduct



crossing have been fully addressed. *See* Millennium Exhibit 1A at 62,176; *cf. Korea Drilling Co.*, 1989 NOAA Lexis 34, \*27 (Jan. 19, 1989) (finding that because exploratory drilling could occur only if a site-specific exploration plan was approved beforehand, the applicant's preliminary activities would not have a significant adverse effect on coastal resources).

Finally, it should be noted that the NYCDEP's principal concern regarding the pipeline crossing of the Aqueduct is the proximity of the pipeline to the Siphon. While the operative assumption seems to be that Millennium plans to install the pipeline "within two feet of the Aqueduct" (New York City Br. at 3), that is not true. There are a variety of engineering techniques for achieving a separation distance between the pipeline and the Aqueduct which, in combination with other measures, will adequately protect the Aqueduct. Millennium intends to explore these options with the NYCDEP and COE and is confident that this issue can be resolved satisfactorily, as the FERC's orders require. In any event, the FERC's requirement that this issue must be resolved before construction can commence, together with Millennium's commitments, should provide adequate assurances to the Secretary that the Project will not have adverse effects on the Aqueduct.

**6. Other Alleged Adverse Effects On The Coastal Zone Are Unfounded**

**a. Terrorism**

The NYSDOS and Cortlandt claim that the Project should not proceed because of the threat of terrorism and the resultant potential impacts on the coastal zone. *See, e.g.*, NYSDOS Br. at 71-72; NYSDOS Exhibit 17 at 2-5; Cortlandt Br. at 18-20. But natural gas pipelines are inherently safe; indeed, they represent the safest means of transporting energy that has yet been devised, and only 1.5% of all pipeline incidents have been attributed to willful acts.

The terrorist attack of September 11, 2001 does not change these statistics, nor does the threat of terrorism (which threat exists with or without the Millennium Project) detract from the extant need for the Project. Millennium Exhibit 1A at 62,169. Attempting to quantify the risk of a terrorist attack to any particular segment of the Project -- or any segment of the more than 300,000 miles of existing pipeline nationwide -- is entirely speculative. *Id.* at 62,168-69. Thus, the FERC properly concluded that while "safety and security are important considerations," "Millennium's pipeline can be safely constructed and operated in the authorized construction corridor." *Id.* at 62,159. Clearly, the threat of terrorism provides no basis for sustaining the NYSDOS's objection.

**b.      Blasting Along The ConEd  
ROW In Westchester County**

Cortlandt's concerns regarding blasting in the ConEd ROW have all been comprehensively considered in the FEIS, mitigative measures have been adopted, and the issues have been effectively resolved. *Contrast* Cortlandt Br. at 30-33 & Affidavit of Calvin Konya with Millennium Exhibit 2 (FEIS), Vol. I, at §§ 6.2.6.1 (at 6-26 to 6-33), 5.8.2, and 5.3; Millennium Exhibit 1A at 62,167-68. Thus, the FEIS acknowledges the concerns raised by Cortlandt's expert and addresses those issues. *Id.* The FEIS not only identifies the potentially affected resources but specifies means for protecting and compensating potentially affected landowners. *Id.* at 62,168. The FEIS also contains procedures for general restoration and describes how residential properties would be restored. *Id.* Finally, the blasting protocols that Millennium will be required to utilize are identified in the FEIS and accord with the DOT's recommendations. *Id.* Consequently, the impacts from blasting along the ConEd ROW will be mitigated to the maximum extent possible, and any residual effects will not be significant.

c. **Indian Point Evacuation Plan**

Cortlandt's contention that the Project will interfere with the Indian Point evacuation plan (Cortlandt Br. at 33-34) also has no support in the record. The FERC's selection of the ConEdOffset/Taconic Alternative as the preferred route through Westchester County, as well as its continued consultation with the Federal Emergency Management Agency ("FEMA"), effectively resolve concerns regarding the Indian Point evacuation plan. *See* Millennium Exhibit 2 (FEIS), Vol. I, at 6-61.

This conclusion is essentially confirmed in FEMA's comments to the Secretary, which address concerns about evacuation from Indian Point in the event of a radiological emergency. FEMA states, in relevant part (FEMA Comments dated December 6, 2002)

"In January 2001 we forwarded the State and local governments' concerns to FERC . . . . FERC has since completed the final environmental impact statement, and issued orders approving construction and operation of the Millennium Project . . . . We also understand that Millennium has abandoned the originally proposed route southward along Route 9/9A. Subject to more detailed review . . . , the proposed new route might resolve a number of our concerns about the originally proposed route along Route 9/9A, which is a major evacuation route. However, the construction would cross Route 9/9A and other roads, entailing at least some curtailment or reduction in their capacity during construction. This is an important matter that we must take up directly with FERC to ensure that mitigating measures can be taken during construction to keep Route 9/9A open as an evacuation route and to ensure that the other routes are not adversely affected."

In addition, FEMA's residential concerns are further resolved by Millennium's plan to install the pipeline underneath Route 9A with a bore technique, which will permit the highway to remain in service and be utilized fully throughout the construction process. Moreover, pipeline operation and maintenance will not disrupt traffic movement on the highway. Therefore, the issues raised by FEMA have been fully addressed. In short, contrary to

Cortlandt's contentions, the Project's potential effect on the Indian Point evacuation plan is unlikely to be significant and is being addressed appropriately by the responsible agencies.

**d. ConEd Transmission Power Lines**

Cortlandt's allegations that the Millennium Project will have significant adverse effects on ConEd's transmission lines (Cortlandt Br. at 28-30), should be disregarded in the first instance because the areas of impact are not in the coastal zone and have no coastal zone resource effects. In any event, ConEd's transmission lines will be adequately protected. Millennium Exhibit 2 (FEIS), Vol. I, at 6-18 to 6-22.

**e. Issues Raised At November 13, 2002 Public Hearing**

NOAA conducted a public hearing in Tarrytown, New York on November 13, 2002 to accept verbal testimony regarding the consistency of the FERC-certificated crossing of the Hudson River and the NYSDOS's objection. A significant amount of the testimony provided by the residents of Westchester County related to the FERC-approved routing of the Millennium pipeline in the Village of Briarcliff Manor which is not within New York's coastal zone.

While the issue of Millennium's route in Briarcliff is therefore not germane to this proceeding, Millennium is sympathetic to the concerns of the citizens in the Briarcliff Manor area and has committed to an ongoing dialogue with the community to address site-specific issues. This is consistent with Millennium's approach to the hundreds of communities across the Project's proposed route, which has resulted in many mutually-acceptable solutions.

Other issues raised by various parties during the public hearing are addressed elsewhere in this reply brief.

**7.      There Will Be No Cumulative  
Adverse Coastal Effects**

NOAA's regulations require not only the assessment of potential adverse coastal effects that has been provided in the preceding sections of this Reply Brief, but also a consideration of "cumulative adverse coastal effects." 15 C.F.R. § 930.121(b). To determine if there are any cumulative adverse effects, the Secretary reviews "the effects of an objected to activity when added to the baseline of other past, present, and reasonably foreseeable future activities occurring in the area of, and adjacent to, the coastal zone in which the objected to activity is likely to contribute adverse effects on the natural resources of the coastal zone."<sup>38</sup>

The NYSDOS stated in its objection that "[t]he construction of a pipeline in this area would be precedent setting and could lead to similar proposals to construct other pipelines across inappropriate areas in Haverstraw Bay" (Millennium Exhibit 10, at 12). This contention should be dismissed as sheer speculation. There is no evidence that the Millennium Project would set such a precedent, for no other pipeline projects across Haverstraw Bay have been proposed or are reasonably foreseeable.<sup>39</sup> In this regard, it must be emphasized that the Millennium Project only proposes to cross Haverstraw Bay because of a unique situation where (1) the existing pipeline that will be incorporated into the Millennium Project terminates just yards from the western bank of Haverstraw Bay at a location where there is ample access and workspace to stage a crossing and (2) an exhaustive review has shown that there are no available

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<sup>38</sup> Decision and Findings in the Consistency Appeal of Mobil Exploration & Producing U.S. Inc. (June 20, 1995), at 52-53.

alternative crossing locations. Because there are no other feasible crossing locations, as the FERC has found, the possibility that any future crossing of Haverstraw Bay might be required is remote.

**8. On Balance, The National Interests  
Furthered By The Millennium Project Far  
Outweigh Any Adverse Coastal Impacts**

To override the NYSDOS's decision, the Secretary must find, by a preponderance of the evidence, that the Millennium Project will not cause adverse effects on the coastal zone substantial enough to outweigh its contributions to the national interest.<sup>40</sup> In this case, the weight of the evidence is solidly on one side of the scale.

The Project's coastal zone impacts will be minimal and temporary. The evidence shows that Millennium's proposed lay-barge crossing of the Hudson River is the best available method for minimizing environmental impacts, that there will be no significant adverse effects to endangered species or essential fish habitat, and that the habitat will be rapidly restored to pre-construction conditions as a result of the limited impacts, restoration measures, and the natural features and forces that shape this environment. Even more clearly, the pipeline route through Croton will have minimal impacts that can be effectively mitigated. Finally, the NYSDOS's professed concerns regarding the impact of pipeline construction on the New Croton Watershed and the Catskill Aqueduct are unfounded, for neither the Watershed nor the Aqueduct are in the coastal zone and, in any event, both of them will be adequately protected.

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<sup>39</sup> See Decision and Findings in the Consistency Appeal of Vieques Marine Laboratories (May 28, 1996), at 54.

<sup>40</sup> Decision and Findings in the Consistency Appeal of Mobil Exploration & Producing U.S. Inc. (June 20, 1995), at 85.

Croton argues that the FERC's analysis of the Project's coastal impacts was "flawed and inadequate." Croton Br. at 15. In support of this claim, Croton states that "NOAA itself noted that none of FERC's several public hearings addressed coastal issues," citing a letter written by NOAA's General Counsel, James R. Walpole, to Croton's attorneys. *Id.* at 15-16 n.

45. But Croton has flagrantly misrepresented Mr. Walpole's letter, which states only that:

"[N]o public hearing specifically addressed the adverse effects of the proposed project on the coastal uses or resources of New York in the context of the objectives of the CZMA as specified in 15 C.F.R. 930.121."<sup>41</sup>

Mr. Walpole properly never suggested that the FERC's numerous public hearings had not addressed coastal issues, given that the sole purpose of all of those hearings was to address all environmental impacts of the Project, including impacts in the coastal zone.

In comparison with the limited coastal zone impacts that are likely to result, the Project's contributions to the national interest will be "incalculable," as the FERC has found. The national interest would clearly be served through the timely development of this important energy infrastructure to satisfy increasing demands for natural gas, relieve constraints on other pipeline systems, and promote the growth of competitive markets. In addition, the Project will enhance the Nation's energy self-sufficiency, permit economic development of the coastal zone that is compatible with clean air objectives, and protect coastal zone resources. Indeed, when clean air impacts and water quality improvements associated with the use of Millennium's natural gas supply in the generation of electricity are factored into the equation, the Project promises on balance to benefit the environment and resources of the coastal zone.

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<sup>41</sup> Letter from James R. Walpole to Neil L. Levy dated August 16, 2002, at 1



FERC Chairman Wood and the FERC Staff have carefully weighed the Project's national benefits against its environmental impacts. Chairman Wood explains the FERC's balancing in these terms (FERC Chairman Comments, at 2)

“While we are mindful that the development and construction of pipeline facilities in congested and heavily populated areas present significant environmental challenges, we balanced these considerations with our overriding responsibility to ensure the timely development of an adequate energy infrastructure, particularly in large employment and population centers such as New York City.”

As the FERC Staff further notes, the FERC balanced many considerations in reaching its decision, “including specifically the impacts to New York’s coastal zone at issue here FERC Staff Comments, at 3. In the final analysis, however, the FERC decided that the Project’s national benefits far outweighed coastal zone effects (*id.* at 4 (emphasis added)):

“It can be expected that the Millennium Project will deliver supplies of natural gas into the heavily populated mid-Atlantic region of the United States for a very long time, perhaps the next fifty to one hundred years. *This contribution to the national interest is incalculable* in terms of economic benefit achieved and environmental consequences avoided over that time-frame. *The impacts of the project on New York’s coastal zone, on the other hand, will be primarily transient and limited* to the time during which construction would occur, typically a period of days or weeks.”

In the final analysis, the relative significance of the national and local interests to be weighed is clear. The Millennium Project will not cause any significant adverse effects on the coastal zone, and the minimal, temporary impacts of pipeline construction will be far outweighed by the Project’s contribution to the national interest, as the FERC and the DOE have emphasized. The Secretary should therefore override the NYSDOS’s objection and permit the Millennium Project to proceed as proposed.